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IN THE

Supreme Court of the United States

No. 237.

SUN SHIPBUILDING COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondents.

BRIEF FOR APPELLANT.

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Washington.

October Term 1925.

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Reference to Reported Opinion of Lower Court.

The *findings, opinion* and *judgment* of the court below from which this appeal is taken is reported in 59 Ct. Cl. 757.

Specification of Grounds of the Jurisdiction of this Court.

This is an appeal from a judgment of the court of claims entered on June 9, 1924 (R. 27). The specific claims advanced and rulings made, by the lower court, which are the basis of this appeal, are presented in the Assignments of Error (pp. 11, 13, *infra*).

In conformity with Sections 242 and 243 of the Judicial Code (36 Stat. L. 1157), expressly conferring the Appellate jurisdiction of this Court in cases similar to this, the court of claims entered an order herein on December 8, 1924, allowing this appeal (R. 28).

STATEMENT OF THE CASE.

At the times herein mentioned the Sun Shipbuilding Company the plaintiff-appellant herein, was and is a Pennsylvania corporation. Beginning with the year 1916 the plaintiff constructed, owned and operated in the City of Chester, Pennsylvania, a large shipbuilding plant, together with the necessary auxiliary fabricating and engine building factory and yards, capable of the efficient employment of upwards of nine thousand men (R. 1, 19). The plant maintained and operated, at the time, five similar shipbuilding ways numbered consecutively from 1 to 5, each adequate for the construction thereon of vessels of more than 12,000 D. W. tons (R. 19).

On June 13, 1917, the plaintiff had on hand various contracts with responsible purchasers, for the construction in its yards of 18 vessels, ranging in their dead-weight tonnage from 10,375 to 12,130 (R. 1, 19).

On May 16, 1917, the plaintiff's shipbuilding Ways ♯1 to ♯4 inclusive, were occupied by four vessels under construction, and Way ♯5 was being held preparatory for the construction thereon of its Contract Vessel ♯7 (R. 19). At this time the material for Vessel ♯7 was on hand and passing through the fabricating plant preparatory to the laying of the keel on Way ♯5 on June 18, 1917 (R. 4, 19, 23).

On or about the date mentioned at the beginning of the preceding paragraph, May 16, 1917, the Secretary of the Navy had under consideration the construction of 24 seagoing mine sweepers, and addressed a communication to the plaintiff requesting information as to the suitability of plaintiff's yards for undertaking part of this work (R. 19). The plaintiff did not desire to undertake this additional work because of its building program as laid out for the construction of the 18 large vessels mentioned, and further because its yards were especially adapted for the construction of vessels of the larger type, all of which was made known to the Navy Department (R. 3, 19).

The efforts of the plaintiff to be relieved from undertaking this new work were unsuccessful, however, and the Secretary of the Navy, under date of June 12, 1917, issued a written order directing plaintiff to construct three of said mine sweepers,

the preliminary paragraph stating that "the President hereby places with you an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the term of a contract, to be signed hereafter, to construct seagoing mine sweepers 22, 23 and 24" (R. 19, 20). In conformity with this order and under date of the succeeding day, June 13, 1917, the contract mentioned was signed, and contained a preliminary provision identical with the one above quoted that it was an order of the President under authority of the Naval Appropriation Act of March 4, 1917 (R. 8).

Both in said order of June 12, 1917, and the contract of June 13, 1917, it was specified that all patterns, plans and materials for the work would be supplied by the Navy Department through a Government agency, Harlan and Hollingsworth Corporation, Wilmington, Delaware. As expressly stated in said order, "*The responsibility for suitability of and delivery of materials,* and for performance of the vessels, in so far as affected by design and materials, *will rest with the Government*" (R. 20, 23, Finding VI), and the contract is to similar effect (R. 8, 9).

Neither the said order nor contract contained any reference to what shipbuilding way or other plant facilities of the plaintiff were to be utilized for the work of constructing these three mine sweepers. The plaintiff's obligations in this respect were expressed in the order, as follows: "You (the plaintiff) will be responsible for workmanship and for the most expeditious prosecution possible of the work *after receipt of necessary materials,* and for the time of delivery, except as affected by delivery of material * * *" (R. 20); and the provisions of the contract were to the same effect (R. 8, 9), though not in the same words.

At some time between June 11 and June 18, 1917, the plaintiff's program for laying the keel of its Contract Vessel #7 on its Way #5 on June 18, 1917, came to the attention of the Secretary of the Navy and his advisers (R. 3, 21). The plaintiff was desirous of going ahead with its plans for laying the keel of its Contract Vessel #7 and advised the Navy officials that it would be able to clear one of its remaining four ways for the construction of the mine sweepers by the time the material therefor should arrive (R. 21). After conferences on this subject, however, the Secretary overruled the plaintiff, and directed that its program

for laying the keel of its Contract Vessel #7 on June 18, 1917, be suspended and that its Way #5 be held vacant and in readiness for the building of the mine sweepers (R. 21).

Accordingly the plaintiff abandoned its plans under contract for the utilization of its Way #5 and held said way open and available for the work of the Government as directed (R. 21, 22).

Subsequently and about June 19, 1917, the plaintiff further sought to be relieved from the work on the mine sweepers and after making an independent investigation into the facilities of some smaller yards, approached the Secretary with the request that it be permitted to assign the order and contract to the Alabama Dry Dock and Shipbuilding Company, which company, as plaintiff was satisfied, was capable of doing the work, and which also was willing and anxious to do it (R. 21). This request of the plaintiff also was denied.

Notwithstanding the above, and in the sequence of events, the necessary material for the laying of the keel of the first of the three mine sweepers did not arrive in plaintiff's yards, so that its Way #5 could be utilized for the purpose of laying the keel of the first of the mine sweepers, until October 8, 1917, and the said way and its supporting facilities remained idle and unproductive during the entire period from June 18 to October 8, or 112 days (R. 22). This delay in delivery of material was continually brought to the attention of the Navy Department in an effort to have these conditions improved (R. 22). Furthermore, after October 8, 1917, when the work was begun, the Government agents, Harlan and Hollingsworth and others delayed the delivery of the necessary material for the reasonable expedition of the work, so that said Way #5 was occupied by the three mine sweepers until May 30, 1918, when the last of the three vessels was launched, a total period of 234 days after the work was commenced on October 8, 1917, or 346 days from June 18, 1917; all of which was brought to the attention of the Navy Department from time to time (R. 22). A reasonable period for the use of the Way #5 for the construction of the mine sweepers, if the necessary material had been furnished to the plaintiff for a proper expedition of the work would have been 118 days (R. 22). Accordingly, by reason of the said delays in the delivery

of material the plaintiff was deprived entirely of the earning power of its said property for a total period of 228, in excess of the 118 days reasonably required by the order and contract directing the work to be done (R. 22, 23).

Notwithstanding the above delays on the part of the Government agencies, the plaintiff on its part met all its obligations and "duly performed all the terms of said contract and duly completed in a good and workmanlike manner all of the work therein to be performed, and delivered the three mine sweepers constructed to the satisfaction of the Navy Department" (R. 22).

The said order of June 12, 1917, and the contract of June 13, 1917, provided that the plaintiff should be paid for the work on the basis of actual cost plus ten per cent for compensation (R. 20, 14), and paragraph Sixteenth of the contract sets forth in detail the basis of cost (R. 13-15). The contract further provided in clause "Seventeenth," that a "compensation board" appointed by the Secretary of the Navy should determine the "*actual cost in accordance with the Sixteenth clause hereof, and shall determine the proper proportions and reasonable allowance referred to therein*, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department" (R. 16).

The claim upon which this suit is based (other than the item of $1,500 admittedly due, for which judgment was rendered by the court of claims in favor of plaintiff), consists of four items (R. 22): (a) $108,258.96 for the value of plaintiff's Way 25 for the 228 days of its unemployment between June 18, 1917, and May 30, 1918, which were in excess of the 118 days reasonably necessary for the work required by the contract, provided the plaintiff had been furnished the building material as agreed; (b) $152,000, under clause Sixteenth 1 (f), of the contract, which provides for a reasonable allowance for depreciation of value of plant and property; (c) $4,400.76 for reimbursement and compensation, including 10% of the base pay, for the proper proportion of salaries of superintendents and officers provided for by clause Sixteenth 1 (c) of the contract (R. 23), and (d) compensation in the sum of $1,335.70 for 10% of certain items of direct labor (paid as retroactive wages at the direction of the Shipbuilding Labor Adjustment Board with the approval of the

Navy Department), which item of compensation is provided for by clauses Sixteenth 1 and 1 (a) of the contract (R. 23).

The claim above outlined was considered by the "compensation board" and disallowed in its entirety (R. 23). The reasons given for the disallowance, if any, were not put in evidence by defendants before the court of claims and are not before this Court in the findings of fact, as will hereafter appear in the "Assignments of Error" (p. 11, *infra*).

The further discussion of the items of the claim and the findings and opinion of the court of claims is reserved for reference in the "Assignments of Error" at page 11, *infra*, and in the "Argument" to follow thereafter (p. 13). In the "Argument," each item will be taken up separately in the order set out in the second preceding paragraph, as follows: Item (a) for $108,258.96, at page 24; Item (b) for $152,000, at page 32; Item (c) for $4,400.76, at page 33; and Item (d) for $1,335.70, at page 33.

Subsequent to the disallowance of the said claim by the Navy Department the plaintiff duly filed its petition in the court of claims (R. 1). The petition sets forth two separate causes of action. The first is based upon the claim of $108,258.96 (Item [a] above), for just compensation, representing the value to plaintiff of its building Way #5 during the period of its unemployment as directed by the Navy Department on the authority of the Act of March 4, 1917 (R. 1). The second cause of action is for the remainder of the items, (b), (c) and (d), which are claimed to be due for work performed and compensation earned under the contract of June 13, 1917 (R. 5).

The court of claims entered judgment on June 9, 1924, disallowing the claim as sued upon, except for $1,500 admittedly due (R. 27). On June 24, 1924, the plaintiff filed a motion for a new trial, which was denied without opinion (R. 27); and on October 27, 1924, the plaintiff filed a motion for leave to file a motion to amend the findings, which likewise was denied without opinion (R. 27).

On December 8, 1924, the court of claims made an order granting this appeal (R. 28).

Assignments of Error.

1.

The court was in error in failing and refusing to find the fair and reasonable value of appellant's shipbuilding Way #5 and supporting facilities, for the period of 112 days between June 18, 1917, and October 8th, 1917, during which time the said way remained entirely unemployed under the directions of the Secretary of the Navy. (See "Second Point," p. 24; and "Fourth Point," (1) and (8), pp. 35, 51, *infra.*)

2.

The court was in error in failing and refusing to find the fair and reasonable value of the said shipbuilding way and supporting facilities for the period of 116 days between October 8, 1917, and May 30, 1918, which were in excess of the 118 days reasonably required to accomplish the work under the contract of June 13, 1917, provided the necessary material had been furnished to appellant. (See "Second Point," p. 24; and "Fourth Point," (2) and (8), pp. 36, 51, *infra.*)

3.

The court was in error in its conclusion to the effect that the appellant was bound by the provisions of the contract to set aside and hold available its shipbuilding Way #5 for the performance of the work required, and that the claim for just compensation for the value of this shipbuilding way could not properly be separated from a claim under the contract. But if the court were correct in this conclusion, it was in error in refusing to find the defendants liable in damages for breach of contract. (See "Fourth Point," (3) and (8), pp. 39, 51, *infra.*)

4.

The court was in error in its opinion that the plaintiff's petition could not be construed as pleading the claim for the requisition of the shipbuilding Way #5 as a basis for just compensation, under the Act of March 4, 1917 (R. 5). But if the petition were insufficient the court should have permitted the appellant to amend same to conform to the proof, in accordance

with the application therefor set out in the motion for a new trial (R. 27). (See "Fourth Point," (4) and (8), pp. 43, 51, *infra.*)

5.

The court was in error in failing and refusing to find what sum would constitute a reasonable allowance to plaintiff, for depreciation of values of plant and property, expressly provided for by section Sixteenth 1 (f) of the contract (R. 14). (See "Third Point," p. 32; and "Fourth Point," (5) and (8), pp. 46, 51, *infra.*)

6.

The court was in error in refusing to find that the claim of $4,400.84, including 10% of the base pay for superintendents' and officers' salaries, was an item of cost of labor and other direct charges provided for by sections Sixteenth 1-a and 1-c of the contract (R. 14). (See "Third Point," p. 32; and "Fourth Point" (6) and (8), pp. 50, 51, *infra.*)

7.

The court was in error in refusing to find that the plaintiff was entitled to receive as an item of compensation for its work the sum of $1,335.70, representing 10% of the cost of direct labor, paid as retroactive wages sanctioned by the Navy Department, which item of compensation is expressly provided for by clause Sixteenth-1, of the contract (R. 14). (See "Third Point," p. 32; and "Fourth Point," (7) and (8), p. 51, *infra.*)

8.

The court was in error under the circumstances of the case in its conclusion that the award of the Navy Compensation Board, "whether right or wrong" was binding on the parties, and that the court was without power to consider the merits of the case, when it was inclined otherwise to make the appellant an award of compensation (R. 25). (See "Fourth Point," (8), p. 51, *infra.*)

9.

The court was in error in its failure and refusal to award judgment in favor of plaintiff for such sums as should be found to be the fair value of its shipbuilding way during the period of its enforced idleness, and in addition thereto the further sum of the items arising under the provisions of the contract more particularly set out in Assignments of Error Nos. 5, 6 and 7, *supra* (p. 12). (See "Fourth Point," (9), p. 59, *infra.*)

ARGUMENT.

Summary of Argument.

First Point (p. 18, *infra*).

The 5th Amendment to the Federal Constitution asserting that private property shall not be taken for public use without just compensation is but a recognition of a long established law founded upon inherent equity. The 5th Amendment, therefore, is liberally construed to cover many cases of property taken constructively as well as actually. However, Congress may, by special legislation, provide some other basis of compensation than that recognized by the 5th Amendment, as for property injured, destroyed or expropriated, in which event compensation is to be determined in accordance with the provisions of such act as may apply.

Second Point (p. 24).

The appellant's shipbuilding Way #5 was requisitioned, though informally, yet in the manner and under circumstances as anticipated and intended to be provided for, by the Act of March 4, 1917. The first item of this claim ($108,258.96) is properly asserted therefore as a claim for just compensation under the Act mentioned, and since also there was a "taking" the claim upon this basis is guaranteed by the 5th Amendment to the Constitution.—History of the said Act in course of passage in Congress.

When possible, legislative acts should always receive an in-

terpretation which consist with principles of justice and equity.

While Article 1, Section 10 of the Constitution forbidding a State to pass laws impairing the obligation of contracts does not expressly apply to Congress, it is nevertheless recognized that Congress should respect the same principle, and acknowledge its violation as an unjust interference with private property unless compensation is provided for.

The Act in question does not specify any form by which the authority therein granted should be exercised; the Government accomplished the results intended and desired, and there is not in the case any public policy which makes necessary, or any justice to commend, a distinction between an "informal" and a "formal" requisition of the property affected.

Third Point (p. 32).

The remaining three items of appellant's claim (aggregating $157,736.36) are based upon express provisions of the contract of June 13, 1917.

The court will take judicial notice of regulations of an executive department promulgated to put into effect an Act of Congress.

Fourth Point (p. 35), Review of Assignments of Error.

Assignment ‡1 (p. 35).

During the period appellant was deprived of the use of its shipbuilding Way it is entitled to just compensation which may be measured by the productivity or earning power of the property.

Assignment ‡2 (p. 36).

The shipbuilding Way, after having been requisitioned, was entirely unemployed from June 18, 1917, to October 8, 1917 (112 days) awaiting material to begin the work required. After work was commenced on October 8th, the said way was occupied until May 30, 1918 (234 days), or 116 days more than the 118 days reasonably required for the work, which was due entirely to the default of the defend-

ants in failing to supply the necessary material for the proper expedition of the work. The period of unemployment of the way (116 days) after work was commenced may properly be regarded as a part or extension of the time the property was under requisition.

Offers of compromise which are without consideration and which are not accepted are not binding on the parties. Hence any effort to effect a settlement of these claims before the compensation board and which were not acted upon are not material.

Assignment #3 (p. 39)

The contract of June 13, 1917, did not require the appellant to set aside its shipbuilding Way #5, but if the court of claims were correct that the contract did so require, the appellant was entitled to damages for breach of contract in the same amount as would be the measure of just compensation as claimed.

Where a party breaches a contract, the other party may elect to stop work and claim anticipated profits, or he may complete performance and sue for damages as for a breach, and in the latter case he is not limited to an action for sums earned strictly under the contract. This right is not waived by completing performance.

Assignment #4 (p. 43).

The petition sets out two causes of action, the first being a claim for just compensation for the value of appellant's shipbuilding way for the 228 days which were in excess of the 118 days reasonably required for constructing the mine sweepers; and the second cause being for expenditures and amounts earned for construction work as provided in the contract. All of the facts were before the court of claims, and justified such judgment as the equities required. The court of claims is not bound by technical rules of pleading. If the court's interpretation of a statute and its application to a case differs from that of counsel the court will be justified in the protection of a litigant's rights, to grant a new trial to permit the pleadings to be framed in accordance with the court's views of the application of the statute.

Assignment ‡5 (p. 46).

The second item of appellant's claim ($152,000) for depreciation of value of plant and property is in accordance with an express payment due for expenditures made and compensation earned under the contract, and all or some substantial part of it should have been awarded as specifically provided in the contract. The compensation board was not authorized to ignore the item altogether and by so doing they misconstrued the contract and made such mistakes as to imply bad faith.

In the construction of contracts the courts will endeavor to determine the intent and understanding of the parties when the contract was made and give its true meaning its logical effect.

When the wording of a provision of an agreement is inserted by a party who is to do the act, it should be given added weight as an affirmative promise that he will do it.

When affirmative words only are used in a document (if it is necessary in order to give them some practical effect), the court must imply to them the sense that they were intended to negative and exclude all other objects and results than that affirmed.

Assignment ‡6 (p. 50).

The third item of appellant's claim is for reimbursement for proper proportion of salaries of superintendents and officers ($4,400.76) and for the purpose of determining whether the court of claims was in error, it may be assumed to have been a proper allowance under the contract, since the court below concluded that the award of the compensation board was binding in any event—"right or wrong."

Assignment ‡7 (p. 51).

The fourth item of appellant's claim ($1,335.70) for compensation for expenditures in direct labor charges (paid as retroactive wages at the direction of the Shipbuilding Labor Adjustment Board), is an item of compensation earned as expressly provided under the contract. The point mentioned

in Assignment ♯6 immediately above, that for the purpose of this appeal the amount claimed may be assumed to have been earned, is likewise applicable here.

Assignment ♯8 (p. 51).

Estimate of engineers and arbitrators whose decisions are to be final and binding may be impeached for bad faith or failure to exercise an honest judgment and also for such mistakes of fact, law, or calculation as would be the natural consequence of bad faith.

If an award is sought to be impeached for actual fraud that fact should be pleaded, but if the theory of the case is that fraud is to be implied in a legal sense from mistakes and errors that have been made, it is generally held to be sufficient to set forth the facts, showing such mistakes and not necessary expressly to plead their legal effect as indicated.

The determination of just compensation is a judicial and not an executive or legislative question.

Assignment ♯9 (p. 59).

It is to be concluded from Assignments 1 to 8 inclusive that the appellant was entitled to have the court of claims consider the case on its merits and render judgment as indicated in the "Conclusion" which follows (at p. 59).

Argument (Continued).

FIRST POINT.

A claim for just compensation for private property taken for public use, is held to be limited by the 5th Amendment to the Constitution to property taken, actually or constructively, but this is not a limitation upon some different basis of claim which may be provided by an Act of Congress.

Admittedly, the right of eminent domain by which private property may be taken for public use, is an incident of sovereignty which does not require constitutional recognition (*U. S. v. Jones,* 109 U. S. 518), and the sovereign may not be sued without his consent (*U. S. v. Clark,* 8 Pet. 444), which applies also to the sovereignty of the United States by virtue of the common law (*The Siren,* 7 Wall. 152). However, from this unquestioned power possessed by the Government, there has been a constant tendency by representatives of the executive branches of the Government, which the courts have not sanctioned, to attempt to narrow and restrict the meaning of the Fifth Amendment to the Federal Constitution (providing that private property shall not be taken for public use without just compensation), as if that guaranty were intended more as a favor, than the recognition of a substantive right.

The principle should not be so confused. The *right* of a government to take private property has always carried with it the obligation to pay for it. This is founded not only upon inherent equity, but likewise upon tradition, so that the right to take and the obligation to pay are parts of one and the same principle. As stated by this Court (*Mr. Justice* BREWER) in *Monongahela Navigation Company v. U. S.* (148 U. S. 312):

> "In the case of *Sinnickson v. Johnson,* 17 N. J. L. 129, 145, cited in the case of *Pumpelly v. Green Bay & M. Canal Co.,* 80 U. S. 13 Wall. 166, 178, it was said that, 'This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of *universal law that the

right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner v. Newburg*, 2 Johns. Ch. 162, *Chancellor* KENT affirmed substantially the same doctrine. *And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.*"

In line with the above quotation, the decision of the Court of Appeal in England in *De Keysers Hotel, Ltd., v. The King* (88 L. J. Ch. [1919] 415), is of especial historical interest. In that case, beginning on May 8, 1916, the War Office took over certain hotel property for occupation in the administrative work of the Royal Air Service, under the Defence of the Realm Acts of 1914. The Attorney General contended, that since no agreement was made with the owners for compensation, and the Act in question did not expressly provide for compensation, the occupation of the property was therefore an incident of the Royal prerogative, and the Government was not under any legal obligation to the owners to compensate them. The Master of the Rolls (*Sir* SWINFEN EADY), speaking for the Court of Appeal, overruled the Attorney General and reversed the High Court of Justice, saying in part as follows:

"It is urged on behalf of the Crown that in the past where lands had been occupied or used for the defence of the realm, there was no legal obligation on the part of the Crown to pay, but that commissions had been issued from time to time, to determine what payments should be made by the Crown *ex gratia*, and the case stood over from time to time to enable the records to be searched and information obtained to show (a) acts of interference by the Crown with private property in land for the purposes of the defence of the realm; (b) claims by subjects for compensation in respect of such interference (1) as a matter of right (11) as a matter of grace, and as to the basis

of such claims; (c) the manner in which such claims were dealt with, and the results thereof. *The result of the searches was that it did not appear that the Crown had ever taken the subjects' land without paying for it, and even in Stuart times I cannot trace any claim by the Crown to such a prerogative.* A considerable search in the records has been made, and the results appear in the book of 'Extracts from our Public Records.' The time covered by the search in the records might be divided into three periods—(1) before 1708; (2) between 1708 and 1798; (3) after 1798. In the first period there were instances of land being required for fortifications, but the land taken or occupied was paid for, as in 1668, when it was decided to construct two new batteries at Chatham, 'for the better security and safety of His Majesty's navy in that harbour.' * * *

* * * * *

"The second period begins in 1708. It appeared then to be fully recognized that the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly in 1708 was passed the first of a series of acts to enable particular lands to be taken compulsorily. * * *

* * * * *

"* * * On April 5, 1798, there was passed the Statute 38 Geo. 3 c. 27. This Act recites that it is expedient that provisions should be made to procure ground which may be wanted for erecting batteries and other works which may be deemed necessary for the public service, and also to provide for the indemnity (in certain cases) of persons who may suffer in their property by measures which may be taken for the defence and security of the country. * * *

* * * * *

"The Defence Act, 1842, recites various Acts of Geo. 3, Geo. 4 and William 4, * * * for the defence and security of the realm, and that it is expedient to consolidate, amend and enlarge such powers and provisions. * * *

* * * * *

"After the outbreak of the Great War two statutes were passed in August, 1914—the Defence of the Realm Act, 1914 (4 and 5 Geo. 5, c. 29) and the Defence of the Realm (No. 2) Act (4 and 5 Geo. 5, c. 63). His Majesty in Council was thereby authorized during the continuance of the war to issue regulations for securing the pub-

lic safety and the defence of the realm, and may be such regulations also provide for the suspension of any restrictions on the acquisition or use of land, or the exercise of the power of making by-laws, or any other power under the Defense Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903. * * *

* * * * *

"Thus, during the Great War, and while the Defence of the Realm Regulations remain in force, the power of acquiring land compulsorily (whether permanently or temporarily) under the Defence Acts is extended, and restrictions on its exercise removed, *but no power was or could be conferred by the regulations to take the land of a subject without payment. In order to secure the public safety and the defence of the realm, it may be necessary to obtain immediate possession of land, but neither the public safety nor the defence of the realm requires that the value of the subject's land or of the temporary possession of it, should be confiscated. Again, if the Executive Government is authorized under the Defence Acts to take and occupy land on paying compensation there is no necessity for the safety of the realm to take any other course, so long as any restrictions on acquiring immediate possession are removed.*"

Likewise a similar statute in the United States which provides for condemnation of property, and which fails to provide expressly for compensation to the owner will be read *in pari materia* with the 5th Amendment to the Constitution (*In re Rugheimer* [1888], 36 Fed. 371).

Furthermore, within the meaning of the foregoing principle as to the right of an owner to compensation when his property is taken for public use, there is no distinction between real and personal property (*Heflebower v. U. S.* [1886], 21 Ct. Cls. 237); and the application of the principle extends to all classes of personal property including contracts (*Brooks Scanlon Corporation v. U. S.* [1924], 265 U. S. 106).

Illustrative of the application of the 5th Amendment, and incidentally a case somewhat similar in principle to the one under consideration is *Mason's* case (1878), 14 Ct. Cl. 70. An officer of the army impressed into the service of the United States twenty-four ox teams for the transportation of supplies, and in passing upon the claim for compensation the Court said:

> "The principles of law as well as the dictates of natural justice raises an implied promise in such case to compensate the owner for the use of his property which the defendants have thus had the benefit of. It would be so in like transactions between individuals if the injured party chose to waive the tort and bring his action upon an implied assumpsit, and it is no less so when the United States are parties, since the constitution has guaranteed to all that private property shall not be taken for public use without just compensation."

And the 5th Amendment should be liberally construed (*Hudson Navigation Co. v. U. S.* [1922], 57 Ct. Cls. 416), so that there have been instances wherein damages to and destruction of private property have been held to amount to a "taking," as is stated for instance by this Court in *United States v. Alexander* (1893) (148 U. S. 186, 188):

> "Whether, under the constitutional provisions of the United States and of the several states, which declare that private property shall not be taken for public use without just compensation, it is necessary that property should be absolutely taken in the narrowest sense of that word to bring the case within the protection of the provision, is a question that has often arisen, and upon which there has not been entire uniformity of decision.
>
> " 'There may be,' said this court in the case of *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. 13 Wall. 166 (20, 557) syllabus, 'such serious interruptions to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution.' 'The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have *many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating.' "

Despite the most liberal construction, however, which has been placed on the constitutional provision, limiting the right to compensation to cases of "taking," Congress has recognized many times that there were instances of injury and damage to property owners, arising from acts of the Government, for which there was no redress under the Fifth Amendment, but which

should be and have been remedied by special legislation, for, as stated by *Chief Justice* GIBSON in *O'Connor v. Pittsburg,* 18 Pa. 187, 190 (cited with approval in *U. S. v. Alexander,* 148 U. S. 158, 192):

> "The constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed; but it follows not that the omission may not be supplied by ordinary legislation."

Thus many instances might be cited of Acts of Congress whereby just compensation was awarded for damages to and loss of private property in respect of which the Government would not be liable under the 5th Amendment. A few such instances by way of illustration are set forth in the footnote* below, although there are others.

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*Note. As an illustration of claims founded upon a law of Congress may be cited a class of claims for horses and vessels lost or destroyed in the military service by the Act of 1849 (9 Stat. L. 414), (see Powell's case 1 Ct. Cl. 400); a class of claims based upon judgments of the Court of Commissioners of Alabama Claims, by the Act of June 2, 1886, 24 Stat. L. 77 (see U. S. v. Weld [1888], 127 U. S. 51), and claims in favor of persons who may have been injured in their property rights, in the construction work of supplying the City of Washington with water from the Potomac River by the Act of July 15, 1882, 22 Stat. 168 (see Great Falls Manufacturing Co. v. Garland, 124 U. S. 581). For reference to Acts authorizing requisition of property 1916-1918, see Hamilton v. Kentucky Distilleries & W. Co. (1919), 251 U. S. 146-64 Law Ed. 199—footnote.

Of comparative interest also may be noted the Indemnity Act (England) 1920 (10 and 11 Geo. 5 c. 48, by S. 2, Sub-s. 1 (b), which provides, "Any person who has, otherwise than by requisition of a ship, sustained any loss or damage by reason of interference with his * * * business * * * through the exercise * * * during the war of any power under any enactment relating to the defence of the realm, shall be entitled to payment or compensation in respect of such loss or damage." For an interpretation of this statute as applied to a state of facts similar in principle to those in Omnia Commercial Company v. U. S. (1923), 261 U. S. 502, see Black v. Admiralty Commissioners, 1 K. B. (1924) L. Rep. 661. Since the Omnia case involves, likewise, similar statutes (Acts of March 4, 1917, now under consideration, and June 15, 1917), it is of interest to note the parallel reasoning and same conclusion reached by this Court and the Court of Appeal in the two cases.

SECOND POINT.

The appellant's shipbuilding Way No. 5 and supporting facilities were set aside for the Government as directed by the Secretary of the Navy. The item of the claim for the value of this way ($108,258.90) during its unemployment, not only may be based upon the Navy Appropriation Act of March 4, 1917, but also the 5th Amendment of the Constitution.

The application of the 5th Amendment to this item of the appellant's claim already has been indicated by what has been said under the "FIRST POINT" above. It will be mentioned again hereafter, under this ("SECOND") "POINT," but, beforehand, reference will be made now to the provisions of the Act of March 4, 1917, and their application to the above-mentioned item of the claim in suit.

The pertinent portion of this act, entitled an "Act making appropriations for the Naval Service for the fiscal year ending June 30, 1918," under the "Naval Emergency Fund" provision, is as follows:

> "To enable the President to secure the more economic and expeditious delivery of materials, equipment and munitions and secure the more expeditious construction of ships authorized, and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers, and such other naval small craft, including air craft, guns and ammunitions for all of said vessels and air craft and for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $115,000,000, or so much thereof as may be necessary and to be immediately available.
>
> * * * * *
>
> (b) "That in time of war, or national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:
>
> "First: Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Govern-

ment, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any such person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish or manufacture the kind, quantity or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Second: Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Third: To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

"Fourth: To requisition and take over for use or operation by the Government any factory, or any part thereof, without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

"That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

> "(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material in accordance with the provisions of Paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum as shall make up such amount as will be just compensation therefor, in the manner provided for by Section Twenty-four, Paragraph Twenty, and Section One Hundred and Forty-five of the Judicial Code."

It is obvious, that the exercise of some of the powers conferred upon the President by this Act would fall within the scope of the 5th Amendment to the Constitution. For instance such would be the case if the output of a factory were taken as provided in the "Third" paragraph, and likewise if a factory or part thereof were requisitioned or taken over under the "Fourth" paragraph. On the other hand, if the President should "modify" or "cancel" a contract, that injury clearly would not be covered by the 5th Amendment.

In the application of this statute to the case under consideration, one of the questions, arising at the outset, is whether there is any importance to be attached to the form by which the purposes of the Act were accomplished. Upon this point the appellant contends that there is not any just grounds for the distinction to have been made by the court of claims between a "formal" and an "informal" requisition. It is apparent, as was the case also in the British Defence of the Realm Acts (*De Keysers Hotel, Ltd., v. The King, supra,* p. 19), that it was at least one of the purposes of this Act of March 4, to remove formalities and restrictions, ordinarily incident to the exercise of the power of eminent domain, in order to expedite and carry out all the purposes enumerated. The Act does not specify, therefore, any restrictions as to how its objects are to be accomplished, whether orally or in writing, or by physical seizure. It was regarded as sufficient if the desired results be accomplished in any way that might be necessary. In this respect the Act was alike in purpose to similar ones, as for instance those of March 3, 1863, and May 11, 1866, by which it was intended to extend protection to

all persons who might act in subordination to the military authorities. In the interpretation of these two acts as to the form of the order by which their purposes were carried out, this Court (by *Mr. Justice* STRONG) said in *Beard v. Burts* (95 U. S. 434):

> "The wood was cut for the military railroads, under military authority, and it was received by the military authorities before military operations in suppression of the rebellion had ceased. *The form of the order we regard as immaterial.* The plain purpose of the Acts of Congress was to extend protection to all persons who might act in subordination to the military authorities engaged in conducting the war."

The directions of the Secretary of the Navy, therefore, requiring appellant to set aside its shipbuilding way for the use of the Government, entitles the appellant to compensation equivalent to the value of its property not only under the paragraphs of the above Act designated "Fourth" and "(d)," but also under the 5th Amendment to the Constitution.

However, there is another application which this Act of March 4th (1917) has to this item of appellant's claim. It will be observed that by its paragraph "Second" (p. 25), the President was given power to "modify or cancel any existing contract for the building, production, or purchase of ships or war material." Accordingly when the Secretary of the Navy directed and required the appellant to abandon its program for laying the keel of its Contract Vessel #7 on Way #5, and rearrange its plans for the remaining 17 large ships then under contract and in process of construction, this order of the Secretary was the exercise of exactly the power intended to be authorized by Congress, and for which the subsequent paragraph "(d)" provides that just compensation should be paid. If any proof need be given that Congress fully understood the condition of affairs in the shipbuilding yards at the time the Statute was passed and intended to provide for the exact situation subsequently confronting the Secretary, it may be found in a portion of the debate in Congress, especially the remarks of the Chairman of the House Committee on Naval Affairs (Mr. PADGETT) in charge of the bill at the time this part of the Act first came up for consideration. It may be added parenthetically that it is customary for the Court

to refer to proposed amendments and especially to remarks of the chairman of a committee in charge of a bill in the course of its passage in Congress as an aid to its interpretation (*U. S. v. St. Paul M. M. R. Co.*, 247 U. S. 310, 318). Reference to the Congressional Record (Vol. 54, Part 3, p. 2580, *re:* H. R. 2632) will show that the following discussion took place on February 3, 1917:

> "Mr. KELLY: And so we come squarely up to this proposition, it seems to me: This Government is entitled to have such protection as we here, representing the American people, deem it wise that we should provide. But it is utter folly for us, it seems to me, under the conditions now confronting the country, to make contracts that will run over 46 months before the ships are ready.
>
> "Now the Secretary of the Navy himself has suggested a remedy in the form of some proposed legislation, and I will read the Secretary's proposition:
>
> " 'Draft of proposed provision for insertion in the naval appropriation bill giving the Navy Department authority to require private manufacturers to give preference to Government work.
>
> " 'In all cases where contracts have been made or orders placed for ships, or munitions, or material entering into the construction of ships or the making of munitions, the Secretary of the Navy is hereby authorized and empowered, when in his judgment the exigencies of the public service demand it, to require the contractor or the individual company, association or corporation, with which such order may have been placed, to give preference to the fulfillment thereof, and precedence of the work over all other work except for the Government.'
>
> *"Now, gentlemen, if we are going to have these ships there is only one way to get them. There is not labor enough of this character in the United States to complete the work for private individuals now in these yards and also complete the work for the Government inside of a period of 46 months. And, therefore, it seems to me, in justice to the people of the country at large, we ought to take steps in this bill to see to it that the protection of the American people is attended to first before other work is carried on."*

After a bill intended to carry out the above suggestion had been proposed and certain amendment offered the above debate continued as follows, at page 2586:

"Mr. MADDEN: I notice in the amendment which the gentleman proposes, there is no provision to compensate the man whose property is taken over by the Government for any loss that he may sustain by reason of the Government taking possession of that property, although there is a provision that compels him to pay excess cost that may be incurred by the Government. It does not seem to me that is fair or right.

"Mr. FITZGERALD: It is not legal either. That is more important. You cannot take a man's property without compensating him for it. * * *

* * * * *

"The gentleman from Illinois (Mr. Madden) has pointed out what may be a very serious objection, that you are proposing to take property without any provision for compensation. That cannot be done. *Now, there is another suggestion that the Government ought to consider, and that is the power of Congress to change, or to modify or to interfere with a contract already in existence.* We cannot now pass any law that adds to a contract a condition not in it, and declare it forfeited if that condition be not fulfilled.

"Mr. MANN: *Why not?*

"Mr. PADGETT: *I think Congress might do so by paying damages.*

* * * * *

"I think the limitation the gentleman has in mind is upon states and not upon Congress."

The foregoing debate is especially applicable to the facts of the case now under consideration, in the light of the opinion of this Court in *Church v. U. S.* (143 U. S. 457), in which the Court said in part:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

This debate which was the beginning of the "Emergency Fund" provision of the Act of March 4th, as finally adopted, shows that Congress was fully cognizant of the conditions to be met. Hence, as the wording of the Act indicates, it was in precise anticipation of the subsequent action of the Secretary in respect of the modification of appellant's existing contracts and the requisition of its shipbuilding way.

Accordingly it was expressly provided by Congress in paragraph "Second" and the subsequent clause "(d)" that if the President should modify or cancel a contract, it would constitute the basis of a just claim in favor of the person whose property was affected. In so providing Congress did no more than recognize, however, in this respect, the spirit of justice ordained in the Constitution. For, while it is true that Article 1, Section 10, of the Constitution (forbidding a State from passing any law impairing the obligation of contracts) does not expressly apply to Congress, yet that is within the spirit of this provision. As stated by *Mr. Chief Justice* CHASE in *Hepburn v. Griswold* (8 Wall. 603, 623):

> "But we think it clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition (Art. 1, Sec. 10) should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." (See Contract [1898] 22 Op. Atty. Gen. 194-10 Fed. Stat. Ann. 949.)

Thus it may be seen that, irrespective of the 5th Amendment, the first item of appellant's claim now under consideration is *doubly* provided for in the Act of March 4th. First, the claim may be predicated upon the impairment or modification of its contract (on its Vessel #7) which was at the express direction of the Secretary of the Navy, and for which compensation was to be awarded as provided in paragraphs "Second" and "(d)" of the statute (*supra*, p. 25). Secondly, a legal basis of the claim is duplicated by paragraphs "Fourth" and "(d)" by which the owner was to be compensated for the requisitioning of a part of its yard and factory. It is obvious however, that whichever basis is adopted, whether under the Constitution or either of the provisions of the Act, the appellant's loss (represented by the 228 days' idleness of its yard) is one and the same claim. If the claim should be based upon the impairment or modification of its contract (Vessel #7) and the resultant disarrangement of its other contracts, the items of damages in any event would

include the value of this Way #5 during the period of its enforced unemployment, and might properly include other items of loss which have not been and are not now claimed. The appellant, therefore, has adopted the basis which would afford the minimum to which it is justly entitled for the loss sustained, namely, the value of its specific property during its unemployment as directed by the Secretary. The equities are all in favor of the appellant. It vacated and surrendered its property, as orally directed by the Secretary. The Government received exactly what it requested and in this respect, all it could possibly have attained, even, by the most picturesque formality. There was, therefore, such requisition of the property as to be within the meaning of the statute, for in this court, "It is an established rule for the construction of statutes that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense consonant with those principles, can be given to them" (*Hepburn v. Griswold, supra*, p. 30).

The court of claims has failed to make a definite finding as to the value of the appellant's said shipbuilding way (R. 22, 23). This omission, as well as the failure to make definite findings on the other items of the claim, as set out in the Assignments of Error (*supra*, p. 11), were brought to the court's attention, by a motion for a new trial, and a subsequent motion to amend the findings, but both motions were denied (R. 27).

Since, therefore, there is no definite finding of values by the court of claims, the appellant cannot ask this court to render a final judgment on this appeal. (See "CONCLUSION" below, p. 59.) For this reason it is not thought necessary or pertinent to discuss the measure of just compensation further than to say that it has been determined to be the equivalent of the property in value to the owner as of the time of the taking or the injury or the expropriation, and that it may properly be based upon either the fair market value, or the earning power of such property, for all available purposes (*Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *New River Collieries Co. v. U. S.*, 262 U. S. 321; *Brooks Scanlon Corporation v. U. S.*, 265 U. S. 106; *U. S. v. Chandler-Dunbar Water Power Co.* [1913], 229 U. S. 53 and footnote).

THIRD POINT.

The remaining three items of appellant's claim (b) $152,000, (c) $4,400.76 and (d) $1,335.70 are expressly provided for as items of cost and compensation for the actual construction of the mine sweepers, under the contract of June 13, 1917.

(b) The item claimed in the sum of $152,000 for depreciation of machinery and equipment (R. 23) is specified in the contract, as an allowable item of construction cost. By paragraph "Sixteenth-1" (R. 14) it is provided that *actual cost* shall be as defined in Section 302 of the Revenue Act of September 8, 1916 (39 Stat. 781); and paragraph "Sixteenth-1-(f)" of the contract (R. 14) reiterates, that this depreciation shall be allowed as a proper item of "cost," thus: "(f) A reasonable allowance, according to the conditions, for depreciation of value of plant and property." The pertinent part of Section 302 of the Act of September 8, 1916, is in accordance therewith as follows:

> "Sec. 302. That in computing net profits under the provisions of this title, for the purpose of the tax, there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States, the following items:
>
> "(a) The cost of raw materials entering into the manufacture; * * *
> * * * * *
>
> "(f) *A reasonable allowance according to the conditions peculiar to each concern for amortization of the values of the buildings and machinery, account being taken of the exceptional depreciation of special plants.*"

The court of claims in its findings (R. 23) states that this item for depreciation is claimed also under clauses "Seventeenth-2" and "3" of the contract. In this, we respectfully say, the court is in error. As the findings show (R. 21) this was a Navy form contract, and these two last mentioned clauses provide liberally for exceptional depreciation in favor of a company which would have to acquire additional plant and equipment to carry out the contract. The appellant, however, already had its plant, and in

operation on other work (R. 19) and accordingly paragraph "Seventeenth-2" and "-3," of the contract does not apply.

The court of claims has declined to find that the appellant was entitled to some allowance on this item or even to find what would be a reasonable allowance if the appellant were entitled to recover (R. 23). While under the rules we cannot go behind the findings of the lower court, there is this to be said: The court of claims in its opinion (R. 26), states that because the Navy Department Compensation Board had jurisdiction to pass upon all the items of the appellant's claim, its conclusion was final and ousted the court of jurisdiction. Hence the court concluded, as stated in its opinion (R. 26), that it was unnecessary to consider this item of the claim on its merits, whatever the proof might establish. It follows, therefore, for the purpose of determining on this appeal, whether there was error by the lower court, that a reasonable allowance (if the appellant were entitled to recover), would have been the sum claimed (R. 23, 26). (See "FOURTH POINT" [#5], p. 46, *infra.*)

(c) The item of $4,400.75, including 10% of the base pay, represents a claim for the proper apportionment of cost of superintendence provided for by clause "Sixteenth-1-(c)" of the contract, which specifies as an allowable item of cost: "(c) A proper proportion of running expense, including ordinary rentals, cost of repairs and maintenance, * * * salaries, and other indirect charges" (R. 14).

The court of claims also has failed to make a finding upon this item more than to state the basis of the claim (R. 23). The disallowance of the item by the Compensation Board, however, is classed by the court along with the other items, as binding upon the appellant "whether right or wrong" (R. 26). Accordingly what has been said above, concluding "(b)" (this page), as to the sufficiency of the findings to raise the point of error by the court of claims, applies likewise here.

(d) The item of $1,335.70 is for compensation, representing 10% of the cost of direct labor which is provided for by paragraph "Sixteenth-1" and "1-(a)" of the contract (R. 14). As to this item the findings of the court below do not present the

details, but since this court will take judicial notice of regulations and formal arrangements which an Executive Department of the Government employs to carry out the express provisions of an Act of Congress (*Caha v. The United States* [1894], 152 U. S. 211) the following explanation is permissible:

The Act of March 4, 1917, among many other things empowered the President in certain respects to regulate conditions and hours of labor in the shipyards (R. 23). On December 8, 1917, the acting Secretary of the Navy and representatives of the United States Shipping Board entered into an agreement with various officials of certain Labor Unions by which there was to be appointed a "Shipbuilding Labor Adjustment Board" (Appendix A, p. 62, *infra*), and it was pursuant to an award of this Board, dated February 14, 1918 (about four months after the work on the mine sweepers had progressed), that the appellant was required* [footnote] to pay $13,357.00 to its employees or former employees as retroactive wages (Appendix B, p. 65, *infra*). It may be presumed from common knowledge that the office work in searching the records and making this expenditure was far greater than would have been required if this additional direct labor cost had been made as the work progressed.

The Navy Department was clearly inconsistent in this matter. It recognized its liability under the contract, to reimburse the appellant for the $13,357.00 as an item of direct labor, but declined to allow the 10% as compensation for the work involved and the cost to appellant of the money necessarily required to carry the adjustment sanctioned by the head of the Department into effect. (See "FOURTH POINT" [#7], p. 51, *infra*.)

*Note. "Regulations prescribed by the President and by heads of Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense the force of law" (United States v. Eaton [1892], 144 U. S. 677, 688).

FOURTH POINT.

Review of the Assignments of Error.

Assignment of Error #1.

The court was in error in failing and refusing to find the fair and reasonable value of appellant's shipbuilding Way #5 and supporting facilities, for the period of 112 days between June 18, 1917, and October 8th, 1917, during which time the said way remained entirely unemployed under the directions of the Secretary of the Navy.

As will appear more particularly in the discussion of the 3rd Assignment of Error (p. 39, *infra*), the *valuation* of the appellant's shipbuilding Way during the period of its unemployment is a necessary factor for the decision of this case. This is so, whether the action of the Secretary directing that the way be set aside for the use of the Government be construed as a requisition of the way, or whether his action was, as was found to be, under the contract. If the former, the appellant is entitled to just compensation equivalent to the value of the property, and if the latter, it is entitled to damages similar in amount as for breach of contract. The result is the same, in so far as to the valuation of the Way being an essential factor for the disposition of the case, as will be further shown.

The value of this property was readily ascertainable upon a fair basis authoritatively accepted. It was a part of a live and going business and was in great demand for use by appellant in its other work. This circumstance which is proper for consideration (*City of Omaha v. Omaha Water Company*, 218 U. S. 180) leaves no room for argument of the practicability of arriving at just compensation for the property under the rule laid down in *Monongahela Navigation Co. v. U. S.* (148 U. S. 312, 328), in which this court said:

> "How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The *value* of the property, generally speaking, is determined by its *productiveness—the profits which its use brings to its owner.*"

To the same effect is the interpretation of the Indemnity Act in Great Britain by the Court of Appeal, in *Elliott Steam Tug Co. v. The Shipping Controller* (1922), 1 K. B. 127:

> "The loss of what the tug might reasonably and fairly be expected to earn for the applicants had she not been requisitioned, is in my opinion direct loss within the meaning of the subsection."

The purpose of the foregoing statements under this Assignment 1 is only to point out that it was quite practicable for the court of claims to have made a finding of the value of this property, which appellant claims to have been $474.82 per day (R. 23), based upon its fair earning power.

Since the court of claims has declined, however, to make a finding of value, on the theory that it is immaterial what the property was worth to the appellant (R. 25, 26) the question for the attention of this Court is whether the court of claims was in error in its conclusion of law, and should be directed to make the additional findings requested in the "CONCLUSION" hereof (p. 59).

Assignment of Error ‡2.

The court was in error in failing and refusing to find the fair and reasonable value of the said shipbuilding way and supporting facilities for the period of 116 days between October 8, 1917, and May 30, 1918, which were in excess of the 118 days reasonably required to accomplish the work under the contract of June 13, 1917, provided the necessary material had been furnished to appellant.

The period of requisition for which just compensation is claimed in the *"First Cause of Action"* (R. 5) includes this period of delay after the commencement of the work, as an extension of the time between June 18, 1917, and October 8th. when the way was entirely unoccupied. The theory underlying this presentation of the case is that the direction of the Secretary requiring the way to be set aside was the exercise of the exact power of requisition, under the circumstances correctly anticipated and provided for by Congress in paragraph "(b)-Fourth" of the Act of March 4, 1917 (*supra*, p. 25), and this entire period of expropriation of the way by the Government was one continuous period which gave rise to a just claim for

compensation expressly provided for by the Act mentioned (as well as the 5th Amendment to the Constitution).

This total period from June 18th, 1917, to May 30th, 1918, was 346 days (R. 22). Obviously, however, the appellant is not entitled to claim compensation for such portion of the 346 days as reasonably would have been required for the occupation of the way by the mine sweepers, provided the material had been duly furnished. The court of claims has found that if the Government had delivered this material as agreed, the reasonable time for the use of the way would have been 118 days (R. 22). The difference, or 228 days, therefore, is the period for which claim is made for just compensation in the *"First Cause of Action."*

What has been said above under Assignment ‡1 (*supra*, p. 35) regarding the valuation of the property prior to October 8, 1917, applies likewise to this period between October 8, 1917, and May 30, 1918, during which time the work on the three vessels was delayed for 116 days awaiting the necessary material for their completion. And the result is the same whether the claim is for just compensation or breach of contract. (See "FOURTH POINT" ‡3, p. 39, *infra.*)

Further, in connection with this Assignment it should be observed that the court of claims has stated in its opinion that during the time the appellant's claims were pending before the compensation board the appellant *"abandoned* its claims on account of delays accruing after the work commenced and asserted it only as to the 112 days during which time this way was idle before the keels were laid for the first two vessels on October 8. However, this claim as originally asserted is now asserted here notwithstanding this *abandonment"* (R. 25).

It is not clear whether the court means that appellant legally released the defendants as indicated or not. But, however that may be, the offer of compromise referred to does not detract from the merits of the case at this time. It is true the appellant made efforts to reach a settlement of the claims with the compensation board, and have the Government at least to share its losses. But these offers of compromise were without consideration and were not accepted, and hence they are not binding in any way upon the appellant. It would be unique, if the Gov-

ernment could thus acquire the "abandonment" of a substantial portion of a claim by mere negotiations for settlement, without giving anything in return (RULING CASE LAW—*"Compromise and Settlement,"* p. 878; 1 PAGE on *Contracts* [1920 ed.], Sec. 273). As stated in *Boyce v. Berger* (11 Neb. 399):

> "A parol agreement of compromise which has been executed is of equal effect with one in writing. But it will scarcely be contended that a mere verbal agreement to compromise, not founded on any consideration, or under which no right has been surrendered, possesses such validity. The *waiver* or *abandonment* of one right may be sufficient foundation for the acquisition of another. But what has the plaintiff *abandoned* in this case?"

In this connection also there is one other point in the court's opinion to which attention is respectfully called. The court refers to a communication from one of the appellant's officers or agents which indicates that the appellant was at least in doubt as to whether the *informal* requisition of the shipbuilding way by the Secretary was the same in legal effect as a *formal* requisition. The court says (R. 25), "During the pendency of the claim with the compensation board the plaintiff did not contend that there was a commandeering of this way, *but that it was held open for this work pursuant to instructions* and that it was 'morally entitled to compensation' as it 'would be legally entitled had the way been *formally* commandeered.'"

So far as may be seen the communication from which the court's quotation is made is not mentioned in the findings. If it were, it would be subject to inquiry as to whether any authority was shown to be possessed by the agent to construe the meaning of the statute in respect of the legal effect of an "informal" as compared with a "formal" requisition, so as to affect adversely the appellant's rights (*Wadsworth v. Livingston County*, 115 N. Y. Supp. 8, 18). However, it is not necessary to discuss the question of agency. This Court has held that statutes, and their application to actions of executive officials taken under them, are for the courts to construe and determine (*Monongahela Navigation Co. v. U. S.*, *supra*, p. 35), and the appellant is entitled to the full exercise of the conscience and judg-

ment of the courts, and we claim should not be prejudiced by the expressions of opinion by those who may not be presumed to know the history and application of legislative acts. "It is emphatically the *province and duty* of the judicial department to say what the law is" (*Marbury v. Madison*, 1 Cranch, at 177).

Assignment of Error #3.

The court was in error in its conclusion to the effect that the appellant was bound by the provisions of the contract to set aside and hold available its shipbuilding Way #5 for the performance of the work required, and that the claim for just compensation for the value of this shipbuilding way could not properly be separated from a claim under the contract. But if the court were correct in this conclusion, it was in error in refusing to find the defendants liable in damages for breach of contract.

It is stated in the court's opinion that the contention of the appellant, namely, that the way was requisitioned, "cannot be regarded as well founded" (R. 25). From this it may be assumed that the court was of the view that the appellant was required by the contract to set aside its Way #5 and hold it available for this work on the mine sweepers. It is not easy to see how this conclusion is justified. The contract in specifying the obligations of the appellant does not mention that any particular part of the appellant's plant or facilities should be vacated and set aside. Accordingly the contract left it to the discretion and judgment of the appellant to make the necessary arrangements to begin the construction of the mine sweepers as soon as the material therefor arrived. And as the record shows, their judgment was, (and as subsequent events proved) it was not necessary to set aside Way #5 for the due performance of this work (R. 22).

But outside the express provisions of the contract, the foregoing was obviously understood by the parties at the time. In Finding IV (R. 21) it will be seen that the direction of the Secretary did not purport to be within the provisions of the contract. Furthermore, as late as June 11, 1917 (the contract being dated the 13th following), the appellant further requested by letter that it be relieved from doing the work if possible. In the same letter appellant stated that if it was required to take

the contract it contemplated buying or building a plant for that purpose (R. 3). It is not reasonably possible, therefore, that a misunderstanding could have existed, regarding what was required of appellant under the contract.

However, this conclusion of the court of claims, that the basis of the claim as for just compensation, cannot be separated from a claim under the contract, brings up for consideration the question as to what effect this should have upon the results. If the court below had found the value of the appellant's property as claimed during the 228 days of its unemployment ($108,258.96), we then would have the circumstance of the appellant having suffered this loss due entirely to the default in the contract by the defendants, which the appellant nevertheless duly performed. Obviously, the equities are quite as much in favor of the appellant, whether the claim be based upon the contract or under the statute for just compensation. The question, then, is, what are the appellant's rights at law, upon the contract theory of the claim adopted by the lower court? The authorities support the proposition that it is entitled to assert a claim similar in amount upon the basis of a breach of contract. The various points which require consideration to lead to this result need not be separately discussed as they are all touched upon in the excerpts from a few leading cases presently to follow. (It may be mentioned that though this theory of the case was not adopted in the petition, it would have been within the province of the court of claims to have rendered judgment in accordance with the equities of the case—or in any event to have permitted the amendment of the petition upon the motion for a new trial, as will be mentioned hereafter. See p. 43, *infra.*)

We have seen that the continuous delays in the delivery of material not only for commencing the work on the mine sweepers but for their completion was repeatedly brought to the attention of the Navy Department (R. 22), but that the appellant nevertheless was required to continue to hold the way available for this work. If, then, these instructions of the Navy Department purported to be under the contract, the case is similar in principle to *Borough Construction Company v. City of New*

York, 200 N. Y. 149, in which the New York Court of Appeals says:

> "This action is brought really to recover the value of extra materials furnished and extra labor done by the respondent while constructing a large sewer under contract with the appellant in the Borough of Brooklyn. It is not brought, however, on the theory of recovering on or under the contract for such extra material or services, but is instituted and thus far has been sustained on the theory that the appellant unjustly required the respondent to furnish material and do work not covered by its contract, and *therefore committed a breach of the contract for which damages, measured by the value of such material and work may be recovered.*
>
> "The sewer which the respondent contracted to construct was a large one, the price being upwards of $800,000.00 * * *. Amongst other things it was provided (in the contract), 'To prevent all disputes and litigation, it is further agreed by and between the parties to this contract, that the chief engineer of sewers shall in all cases * * * decide every question which may arise relative to the execution of this contract on the part of the said contractor, and his estimate and decision shall be final and conclusive upon said contractor.'
>
> * * * * *
>
> "The learned counsel for the appellant with considerable insistence advances arguments applicable to an action brought to recover on contract for extra services and materials and leading to the conclusion that such recovery cannot be permitted because such materials and work were not called for or authorized in the manner prescribed by the contract. Of course, on the premises formulated by counsel on this theory, his conclusions are unimpeachable, but the answer to the entire argument is that this action does not rest on any claim for extra services or materials under the contract, *but on an alleged breach of the contract by the city and its representatives, whereby the respondent has suffered damages, and the question is whether the action can be maintained on that line.*
>
> *"I regard it as settled that it may be; that within certain limits a contractor who is ordered by the proper representatives of the municipality to furnish materials or do work as covered by his contract which the former thinks is not called for by such contract may under pro-*

test do as directed and subsequently recover damages because he has been so required, even though it should turn out that the contractor was right, and that the official had no right to call on him to furnish such materials and do such labor. Decisions of this court have so conclusively established the principle that under such circumstances the contractor may treat the conduct of the municipality acting through its representative as a breach of contract and recover damages that it is only necessary to summarize these without argument." *Gearty v. Mayor,* 171 N. Y. 61; *Lentilhon v. City of New York,* 102 App. Div. 548; *People ex rel. Powers, etc., Co. v. Schneider,* 191 N. Y. 523, cited.

In *Gearty v. Mayor, etc., of New York* (171 N. Y. 61, 71), it is stated:

"We thus have a situation where each party charges the other with breach of the contract. The City insists that the work was improperly done and the contractor urges that the Commissioners are arbitrarily and improperly exercising the powers vested in them by the contract. Questions of fact and law are thus presented, which can only be determined by a trial.

"It is very clear that the plaintiff could have stopped work as ordered by the engineer of construction and stood upon his contention that the work had been properly done, brought his action to recover for labor and materials performed and furnished under the contract and claimed his prospective profits (*Smith v. Wetmore,* 167 N. Y. 234; *Roehm v. Horst,* 178 U. S. 1).

"The important question is whether a second remedy is open to the contractor, such as is invoked in this case. The plaintiff did not choose to put himself in the attitude of refusing to obey the directions of the Commissioners, thereby assuming the position of a defaulter under a contract with the City, but preferred to perform it as best he could, accepting under the final certificate such amount as the City admitted to be due him * * *.

* * * * *

"If this were an action for extra work under the contract, such a certificate [of final completion] would be necessary, but as already pointed out, this is an action to recover damages for a breach of the contract, and the provision requiring the certificate has no application.

"We are of the opinion that either of the remedies discussed was open to the plaintiff at his election * * *."

Also this court has said by *Mr. Justice* HOLMES that a "claim for damages on the ground that the United States did not perform its part of the contract on time" is not necessarily waived by completing performance (*American Smelting & Refining Co. v. U. S.*, 259 U. S. 75, 79). See also, *Garfield & P. Coal Co. v. Fitchburg R. Co.*, 166 Mass. 119, 123.

Assignment of Error #4.

The court was in error in its opinion that the plaintiff's petition could not be construed as pleading the claim for the requisition of the shipbuilding Way #5 as a basis for just compensation, under the Act of March 4, 1917 (R. 5). But if the petition were insufficient the court should have permitted the appellant to amend same to conform to the proof, in accordance with the application therefor set out in the motion for a new trial (R. 27).

The court of claims in its opinion states that "it is difficult to construe the petition as asserting" the theory that the appellant claims just compensation for the requisitioning of the way, outside of the provisions of the contract (R. 25). We are unable to understand in what respect the court regarded the petition as insufficient upon this point. A considerate effort was made to set out in the petition the basis or theory of the case as claimed. It will be noted that the petition sets up two separate and distinct causes of action. In the first, which deals with the claim for the value of the way during its unemployment, it is alleged in paragraph VI (R. 4):

> "At or about the time said requisition order was placed with the plaintiff, *the Secretary of the Navy and his agents acting for the president, directed the plaintiff to keep one of its shipbuilding ways, designated as No. 5 free and clear of all other work in order that the same might be available for the performance of said order dated June 13, 1917;* and plaintiff, in compliance with said instructions of the Secretary of the Navy and his agents, kept said way free and clear of all other work, and the way remained idle on account of the failure of the Navy Department to supply material until October 8, 1917, the date of laying the first keel, or 112 days; and the further unreasonable delay of the Navy Department in the supply

of material caused the way to remain occupied on the work to May 30, 1918, or a total of 346 days."

This allegation is followed by paragraph VII, which states in part (R. 5):

> "By reason of the premises and the said requisition orders of June 11 and 13, 1917, and the said Act of March 4, 1917, *there arose and exists an implied promise on the part of the United States to pay as just compensation to the plaintiff for the period said way was unoccupied and unproductive, the sum of $108,258.96.*"

Furthermore, the "Second Cause of Action" (R. 5) begins by realleging by reference, the paragraphs of the "First Cause of Action" (I to IX inclusive), except the above paragraphs VI and VII, which are omitted. The "Second Cause of Action" then contains six additional paragraphs (XII to XVII) which set forth the claim under the contract of June 13, 1917, for the remaining three items (R. 6)* of the claim.

While we think the court of claims was in error in its observations regarding the petition, in any event the true state of facts and circumstances were presented to that court sufficiently for the rendition of such judgment as the equities of the case require. By its Rule 15, and Section 159 of the Judicial Code, and the practice in the court of claims, that court is not bound by strict rules of pleading customarily employed by other courts of more general jurisdiction.

> "The court has never felt bound by all the strict and technical rules of pleading incident to actions in the courts of common law or in equity." *Brown's case* (17 Ct. Cl. 303).
>
> "And the court of claims in deciding upon the rights of claimants, is not bound by any special rules of pleading" (*Mr. Justice* FIELD in *U. S. v. Burns*, 12 Wall. 246, 253, cited in *District of Columbia v. Barnes*, 197 U. S. 147, 154).

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*Note. In the petition (R. 6) the item for depreciation was claimed in the sum of $95,773.75, but testimony having been given tending to justify the allowance of $152,000, it is referred to in the findings as the latter sum (R. 23).

And this practice of the court in declining to be bound by strict rules of pleading has been applied to the extent of awarding a counterclaim in favor of the United States, although it was not pleaded. The point came before this Court (*Wisconsin Central R. Co. v. U. S.*, 164 U. S. 190, 212), and *Chief Justice* FULLER, speaking for the Court, said:

> "* * * and to each and every allegation of the petition the Government interposed a general traverse. It is now said that a counterclaim or set-off should have been pleaded, but the record does not disclose that this objection was raised below, while the *findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the court of claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand* (*United States v. Burns*, 79 U. S., 12 Wall. 246, 254; *Clark v. United States*, 95 U. S. 539, 543; *United States v. Behan*, 110 U. S. 338, 347; *United States v. Carr*, 132 U. S. 644, 650)."

Furthermore, as illustrative of the province of the courts in a representative State in regard to correction of pleadings, may be cited the practice in New York. By Section 723 of the N. Y. CODE OF CIVIL PROCEDURE it is provided:

> "The Court may, upon the trial, or at any other stage of the action before or after judgment, in furtherance of justice, and on such terms as it seems just, amend any process, pleading, or other proceeding * * * *by inserting an allegation material to the case, or, where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceedings to the facts proved.* And in every stage of the action, the Court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party." (See also *Rubin v. Maine SS. Co.*, 51 Misc. [N. Y.] 665; *Herbert v. DeMurias*, 115 App. Div. N. Y. 453.)

It is not known to what extent the observation of the lower court respecting the petition may have influenced it in its final conclusion. However, if it were of consequence, in any event

it would have been in accord with the established practice in other courts of general jurisdiction to have granted the appellant a new trial for which a motion was made (R. 27), in order to permit the appellant to amend its petition to conform to the proof. For instance, this practice has been sanctioned in cases similar in principle where there may be reasonable differences of opinion as to the construction or application of a statute to the state of facts upon which the suit is based.

> "But there may be questions of the proper construction of a statute or of a judicial decision, upon which very learned counsel might reasonably differ in opinion without much fault on their part, as the case was in *The People v. Barnes* (12 Wend. [N. Y.] 492), and as we think may have been the case here. The rights and interests of the parties are not wholly to be overlooked, and it would require a more rigid application than the whole circumstances would appear to justify, to bring the case within the strictness of the rule.
>
> "For all that appears, the plaintiffs may have a good cause of action; * * * and we think the ends of justice will be better subserved by granting a new trial on the condition of paying costs" (*Pope v. Mooney*, 40 Mo. 104).

Assignment of Error ‡5.

The court was in error in failing and refusing to find what sum would constitute a reasonable allowance to plaintiff, for depreciation of values of plant and property, expressly provided for by Section Sixteenth 1-(f) of the contract (R. 14).

Under clause "Sixteenth 1-(f)" of the contract (R. 14) and Section 302-(f) of the Act of September 8, 1916 (*supra*, p. 25), which is made a part of the contract by reference, the defendants were under a definite contractual obligation to compensate the appellant for the work described by a "reasonable allowance" for depreciation of plant and machinery. By clause "Seventeenth" the Compensation Board were authorized to "ascertain, estimate and determine—the *reasonable allowance* referred to," which obviously means this allowance in the "Sixteenth" clause for depreciation, as no other is mentioned in the clause to which reference is made.

Can this be said to mean that the board was thus given the power to make no allowance at all for depreciation? Within the meaning and spirit of the contract it cannot. There are several established rules for determining depreciation of a factory and plant as was here used, over a given unit of time. Somewhere in the field of the average of these rules, and no lower than the lowest percentage customarily allowed would be "reasonable." That and that only was the "Compensation Board" authorized to "ascertain, estimate and determine." Accordingly when the board made no allowance at all for depreciation they violated the contract. They misconstrued its meaning and by so doing their action was arbitrary and unreasonable, and in a legal sense constituted such a mistake as to imply bad faith (*Lewis v. Chicago S. F. & C. Ry. Co.*, 49 Fed. 708).

Certainly, it cannot be said that a shipbuilding yard and factory built up during the war was not such property and equipment as was subject to the depreciation provided for. The history of the times, the sudden depreciation of the value of ships immediately following and continuing since the war, and the fact that the Navy Department expressly recognized this circumstance in its form contract which is under consideration, would refute that contention, if made.

This was a government form contract, and the obvious purpose of the provision under consideration was to lead the party who was to do the work to expect some remuneration that was affirmative. The inference to be drawn from the circumstances of the case logically lead to the conclusion that the parties so understood it, and when such is the case the intention of the parties is controlling (LEAKE on *Contracts* [1921 ed.], 151; PAGE on *Contracts* [1920 ed.], 602). As stated by this Court in *Scott v. U. S.*, 12 Wall. 443, "It is the duty of the Court to assume the standpoint occupied by the parties when the contract was made—to let in the light of surrounding circumstances—to see as the parties saw, and to think as they must have thought in assenting to the stipulations by which they are bound." Furthermore, added weight may be given to the fact the contract in suit was prepared by the Navy Department, and the appellant was justified, therefore, in relying upon all its provisions (designat-

ing what the defendants would do) as constituting an affirmative *promise* and not a condition. As stated by Mr. LANGDELL (*Summary of Contracts,* Sec. 33):

> "Moreover, the words of such a clause will have, in fact, a different meaning, according to the party who uses them. If they are used in a contract by the party who is to do the act, *they plainly import that he binds himself to do it;* while, if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done, *i. e.*, that his own obligation shall be conditional upon its being done."

If there were to be a possible alternative of no allowance for depreciation it is fair to assume that a few appropriate words to that effect would have been added, (for instance words to the effect that, *there will be a reasonable allowance, or no allowance for depreciation within the discretion of the compensation board*). But that would have made an entirely different contract, and we cannot assume it would have been signed if that alternative had been inserted. As to the contract in suit, it is obvious that unless these affirmative words (in clause 16th-1-f, that "The actual *cost shall include* * * * a reasonable allowance, according to the conditions, for depreciation of values of plant and property"), are interpreted to *exclude* any result which is negative of, or opposite to that affirmed, the entire clause is "mere surplusage," and has no operation at all. Since, however, all the terms of a contract must be assumed to have a purpose, it cannot be that the complete negative result indicated was intended by the parties. In such circumstances the rule is that when *affirmative words* only are used in a separate clause of a document, if it is necessary in order to give them some practical effect, the court must imply to them the sense that they were intended to negative and exclude all other objects and results (than that affirmed). (*Marbury v. Madison,* 1 Cranch 138, 174.) This is only the logic of the point involved, but more than that, it would not be moral for one to contract for work to be done agreeing to pay a "reasonable allowance" therefor, to be determined in accordance with a rule understood and employed by business men, and after the work was done, then to repudiate the rule and say that no allowance at all was "reasonable."

We are aware that it may be said that this reasoning leads to the conclusion that if the board had made only a nominal allowance (which was substantially nothing), it would have constituted a legal award which was final. That may be so, but for the purposes of this appeal the distinction between a nominal award and nothing at all is this: If the Compensation Board had made but a nominal allowance, it would be difficult, if not impossible, under the rules, to point out to this Court wherein the nominal allowance was contrary to the proof, and not a "reasonable allowance." But it does not require recourse to the proof to demonstrate that no allowance whatever was arbitrary and unreasonable, because it is obvious that the action of the board had the effect of eliminating entirely the sub-clause "Sixteenth (f)" from the agreement. Therefore the agreement as a whole was misconstrued and mistakenly applied. This, then, must be such a case as gave rise to the law that where an arbitrator in his award accomplishes such inequitable results and makes such mistakes as are the equivalent of, and which therefore imply bad faith, his award is not binding on the parties. (See authorities cited, p. 54, *infra.*) As is said in *G., H. & S. A. Ry. Co. v. Henry & Dilley* (65 Texas 692):

> "The parties agree, as they did in this case, that he (the engineer) shall determine as to the amount of the work done by them under the contract, not that he shall make a different contract for them. He decides under the *legal* construction of the contract, not upon such construction as he may choose to give it. *He is not made the arbitrator, to whom is to be referred difference as to the meaning of the contract, and he cannot adopt rules of measurement that it does not authorize.*
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> * * * * *
>
> "* * * None of the decisions to which we are referred by appellant go so far as to allow the engineer to vary the contract, or to decide as to its meaning and intent (*M. & P. Ry. Co. v. March, supra,* 114 U. S. 549; *Herrick v. V. C. Ry. Co.*, 27 Vt. 673; *Kidwell v. B. & O. Ry. Co.*, 11 Gratt. 676; *Kihlberg v. United States*, 97 U. S. 398; *Sweeney v. United States*, 109 U. S. 618).
>
> *"There are decisions, however, to the effect that where the engineer is the party whose estimates are to govern, he must not base them upon an erroneous view of the*

contract; if so, his estimate will not conclude the parties (McAvoy v. Long, 13 Ill. 147; *Alton Ry. Co. v. Northcott,* 15 Ill. 49; *Kistler v. Ry. Co.,* 88 Ind. 460)."

The application of the opinion of the court in the *Henry and Dilley* case to the facts of the case under consideration is this: The contract of June 13, 1917, provides that the compensation board "*shall* ascertain, estimate, and determine the actual cost *in accordance with the sixteenth clause hereof,* and *shall* determine the proper proportions and reasonable allowances referred to therein" (R. 16). If, therefore, under the true legal construction of the contract the appellant was entitled (1) to an affirmative award of some "reasonable allowance" for depreciation, (2) to a proper proportion of salaries of officers, and (3) to the item of $1,335.70 (which is admittedly 10% of a sum of money paid out as retroactive wages to employees), then, the compensation board had no authority to make an award which was clearly repugnant to this true interpretation of the agreement. (See cases cited, pp. 54, 55, 56, *infra.*) Likewise the same point applies to item (a) of appellant's claim (p. 9, *supra,* for the value of the shipbuilding Way during its unemployment), provided, this court should agree with the court of claims that it may be based only upon breach of contract, and not for just compensation under the Act of March 4, 1917. If, however, this item of the claim is properly one for just compensation under the Act of March 4, as claimed, it is obvious that the question involved is judicial, and the determination of the board is not final in any event. (See p. 59, *infra.*)

We do not think that the case at hand requires especial reliance upon the rule, that if an arbitrator or referee is an employee of one of the parties, he is held to a high standard of diligence and good faith (*Edwards v. Hartshorn,* p. 58, *infra*), but it would seem that this rule would have an application particularly to any case in which the power of eminent domain was exercised throughout the entire transactions, and where the party who was to do the work was obviously without choice in the selection of the arbitrator.

Assignment of Error ‡6.

The court was in error in refusing to find that the claim of $4,400.84, including 10% of the base pay for superintendents' and officers' salaries, was an item of cost of labor and other direct charges provided for by sections Sixteenth 1-a and 1-c of the contract (R. 14).

This error of which complaint is made is explained in the remarks above concerning the basis of this item of the claim (*supra*, p. 33).

Assignment of Error #7.

The court was in error in refusing to find that the plaintiff was entitled to receive as an item of compensation for its work the sum of $1,335.70, representing 10% of the cost of direct labor, paid as retroactive wages sanctioned by the Navy Department, which item of compensation is expressly provided for by clause Sixteenth-1 of the contract (R. 14).

Also the error claimed in this assignment is explained above in the outline of the basis of this item of the claim (*supra*, p. 33). As pointed out there, the orders of the Labor Adjustment Board, with which the Navy Department was co-operating, required the appellant to revert to its time sheets and other records, and expend of its capital $13,357.00 in the payment of retroactive wages, for past work on the mine sweepers. This outlay of capital and labor was recognized by the Navy Department as direct labor cost under the contract to the extent only of reimbursing the appellant for the actual money paid to the laborers. But the 10% of this expenditure to which appellant was entitled under the contract as compensation for this part of direct cost was disallowed. This, it is contended, is a clear case of a mistake on the part of the compensation board in the construction of the contract.

Assignment of Error #8.

The court was in error under the circumstances of the case in its conclusion that the award of the Navy Compensation Board, "whether right or wrong," was binding on the parties, and that the court was without power to consider the merits of the case when it was inclined otherwise to make the appellant an award of compensation.

This Assignment of Error arises primarily in connection with that portion of the court's opinion which is as follows (R. 26):

> *"We need not consider the basis of the board's conclusion in the matter further than to suggest that, whether right or wrong, the claim was given careful consideration and there is no averment or evidence of bad faith or failure to exercise an honest judgment. Under the circumstances we cannot review the finding of the board."*

If this were a correct statement of the law on the subject, it is obvious that a party would have no escape from an award of an arbitrator, however capricious and arbitrary his action might be, or however unjust and erroneous his award, unless the party injured could prove intentional fraud on the part of the arbitrator. Furthermore, such a rule would be of extremely limited value in practical business affairs. In the first place comparatively few arbitrators chosen by parties to adjust differences are intentionally dishonest; and secondly, in the relatively small number of cases in which they are, it would be impossible to prove the actual fraud (*dolus malus*) except possibly in rare cases. On the other hand, there have been many instances of "arbitrary," "mistaken," "unreasonable" or "capricious" viewpoints, and negligence on the part of an arbitrator, resulting in *mistakes* of law, or facts, or calculations, which were so unjust and inequitable that the results to the injured party were quite as bad or worse than if intentional fraud were committed. Accordingly the courts have extended the circumstances which the court of claims has not mentioned and under which an award may be set aside to include not only intentional fraud, but also such mistakes of law or fact, which, though innocently or ignorantly made, are such as to imply dishonesty and bad faith in a legal sense. As thus extended and as recognized by this Court and the courts throughout the country this rule of law affords a basis of relief which is of practical value, for it is oftentimes possible to prove that a party is unjustly or unlawfully injured by substantial or gross mistakes on the part of an engineer or arbitrator chosen by the parties.

The court of claims has declined to consider this case on its merits because as to the award of the compensation board "there is no *averment* or *evidence* of bad faith or failure to exercise an honest judgment." First, as to the question of "averment" or pleading, what the court says is so, and the reason for it is this:

We do not say, for we do not believe, that the compensation board or the navy officials who conducted the transactions involved herein were intentionally dishonest. But we hold that they were mistaken in the interpretation of the contract and the construction and application of the statute and that the appellant, therefore, has the right upon that ground to invoke the jurisdiction of the courts. (See *Norfolk & Western R. R. Co. v. Mills and Fairfax*, 91 Va. 613.) Secondly, both as to the pleading and the evidence, the error into which it is contended the court has fallen is discussed in *Cook v. Foley* (152 Fed. 41, Circuit Court of Appeals, Eighth Circuit). The case was before the court involving the correctness of the following charge to the jury by the trial court:

> "Now, it is for you, gentlemen of the jury, to determine in the case what the amount of these different materials was, and what the different classifications were. If you are satisfied that this work of measurement and of classification was honestly performed by these engineers, * * * if you are satisfied that these men did this work honestly, * * * it would substantially end the case."

With respect to this charge, the Circuit Court of Appeals said:

> "If the trial proceeded from a correct view of the plaintiff's contract, this portion of the charge was erroneous for that it accorded to the testimony of the engineers of the railway company and the estimates made by them of the work done by the plaintiffs undue probative force and effect.
>
> "In effect, it charged the jury, if the estimates were honestly made by the engineers of the railway company, as shown by their testimony, that ended plaintiff's case. In other words, it made the accuracy of the estimates of measurements and classifications of the engineers of no moment, but their honesty the sole test.
>
> * * * * *
>
> "Final estimates made by engineers in pursuance of such a contract are in legal effect an award made by arbitrators, and are final and conclusive in the absence of fraud or such gross mistakes as to imply bad faith or a failure to exercise an honest judgment."

To the same effect are the decisions of this Court and the courts

generally, as may be noted in the following examples. In *Chicago, Santa Fe & C. R. Co. v. Price* (138 U. S. 185, 193), by *Mr. Justice* HARLAN, it is said:

> "They chose to risk his estimates, and rely upon their right, which the law presumes they did not intend to waive, to demand that the engineers should at all times, and in respect to every matter submitted to his determination exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

See also *Wood v. Railroad Co.*, 39 Fed. 52, and citations; *Street v. Morrison*, 116 N. Y. 19; *Brush v. Fisher*, 70 Mich. 469; *Marks v. Northern Pacific Co.*, 76 Fed. 941; *Ripley v. U. S.*, 224 U. S. 695.

Furthermore, an error of law is of equal consequence with an error of fact. In *Learned v. Bellows* (8 Vt. 79 [Syllabus]) it is said:

> "Reports of referees are not to be set aside for every circumstantial error, but only where they adopt a rule of action *and misapply it*, and in this respect it is immaterial whether it be a *rule of law or of equity or of arithmetic.*"

So it is in England, as stated by Lord HALDANE, L. C., in *British Westinghouse Elec. and Mfg. Co. v. Underground Elec. R. Co.* (1912), 81 L. J. R. 1132:

> "I am of the opinion that the doctrine of *Hodgkinson v. Fernie* (1857, 3 C. B. [N. S.] 189), to the effect that where an error of law appears on the face of the award, the error can be reviewed, is a well established part of the law of the land."

And such "mistakes" may be shown by an arbitrator's refusal to act in accordance with the arbitration clause of a contract (*Moran v. Schmitt*, 109 Mich. 282, 292). They may also be shown by the negligence of the arbitrator or referee in the performance of his duties.

> "We consider the mistake in the present case to be a mere clerical *mistake*, by which the arbitrators have not expressed, in the copy of the award delivered out, the intention of their own minds, but one widely different.

> At the same time, the *mistake*, as a matter of carelessness, is so gross as to amount, though not in a moral point of view, yet in the judicial sense of that word, to misconduct, on the part of the arbitrators. *Lata culpa, et crassa negligentia*, both by the civil law (* * *) and our own, approximate to and cannot be distinguished from *dolus malus* or misconduct. We think we do not extend the jurisdiction of the court beyond its limits when we give relief under such peculiar circumstances by holding this to fall within the power of the court to give relief in cases of arbitration" (*In re Hall and Hinds* [1841], 10 L. J. C. P. at 212).

Upon an examination of the foregoing cases which contain the several statements in which the term "mistake" is employed, the inquiry naturally arises as to a proper definition of that term for purposes of practical application. A case, which, while it deals with the term as applied to the particular subject at hand, yet is so comprehensive as to afford a practical view of the entire subject is *Lewis v. Chicago, S. F. & C. Ry. Co.* (49 Fed. 708, 710). The suit was to recover a balance due for grading a portion of defendant's railroad bed. The contract provided that the decision of the engineer in certain respects should be final and conclusive. In regard to the conclusiveness of the engineer's decision the court said:

> "The estimate (engineers') may be impeached for fraud; that is to say, it may be shown that the engineers in charge intentionally underestimated or overestimated the work. It may also be impeached by proof of gross errors in the measurements and calculations. If the evidence shows such errors, it either creates the presumption of fraud, or warrants the conclusion that the engineers did not exercise that degree of care, skill and good faith in the discharge of their duty that the law exacts; *and in either event the court will disregard the estimate so far as is necessary to do substantial justice. The meaning of the word 'mistake,' as above employed, must be carefully defined.*
>
> "(a) The court will relieve against *mistakes* in measurements and calculations that are apparent on the face of the estimate, or that are clearly proven, though not so apparent.

"(b) If it is satisfactorily shown that the engineers failed through oversight, to measure or estimate any particular part of the work, the court will grant relief as to such *mistakes.*

"(c) If it appears that the engineers in charge put a wrong construction on any provision of the contract, the court will correct any substantial errors resulting from such *mistake,* for the reason that the parties did not make the decision of the engineers as to the proper interpretation of the contract final and conclusive. *It is the province of the court to construe the agreement, Bridge Co. v. City of St. Louis,* 43 Fed. 768.

"(d) But in determining the kind of material found in the several cuts, the engineers were called upon to exercise their judgment. That was a matter, as the contract in substance recites, which involved the exercise of special skill and attention as the work progressed, and for that reason the parties selected an umpire, by whose judgment they agreed to be bound (*Ranger v. Railway Co.,* Eng. Ry. Cas. 1, 13 Sim. 368). The court will not undertake to revise the decision of the engineer on questions of that character if it appears that he acted in good faith. The utmost it can do is to correct errors of classification that may have resulted from an erroneous interpretation of the contract."

In *Bridge (King) Co. v. City of St. Louis,* 43 Fed. 768, it is stated by the court in its opinion:

"*Second.* The next question is whether the eighth clause of the contract gave the street commissioner such broad powers as an arbitrator, that his decision on making the final estimate that the plaintiff was in law liable for liquidated damages, is conclusive between the parties, although manifestly erroneous. This question must be answered in the negative. *The contract made the decision of the street commissioner conclusive as to all questions concerning the amount of work done, provided he acted in good faith, and with reasonable care and circumspection. With the same reservations that he acted in good faith and with reasonable care, it also made his decisions final as to all questions whether the work was done in accordance with the drawings and specifications,* and was fully up to the standard of excellence mentioned therein. These were all questions of fact, depending for

their correct solution on professional knowledge and skill; and the parties might reasonably and lawfully submit them to the determination of an arbitrator, and agree to be bound by his decision (*Wood v. Railway Co.*, 39 Fed. Rep. 52, and citations).

"But the question which the street commissioner undertook to decide was purely a question of law, as to the effect which the failure of the city to have the bridge piers completed within one week and ten months after the notice was served, had upon its right to demand liquidated damages. *I am satisfied that the contract, properly construed, did not commit that question to the determination of the street commissioner; it was wholly outside of his jurisdiction.*"

The inquiry arises also in connection with the above portion of the court of claims' opinion (*supra*, p. 51), as to the necessity of an allegation in the petition that there was actual or constructive fraud,* or failure to exercise an honest judgment on the part of the compensation board. We may assume that if it is desired to set aside an award upon the single ground that it is tainted with intentional dishonesty by the arbitrator, that fact would have to be pleaded in order that proof might be admissible to sustain it. Obviously, however, that is not the case here, for we do not claim that there was actual or intentional fraud committed. The question, then, is, is it necessary in a case where the contract has been fully performed and it is claimed that the mistakes of law and fact by an arbitrator are such that the award is not binding, to plead expressly this conclusion? In other words, is it necessary to insert a phrase in the petition, to the effect that the *foregoing facts alleged, constituted such mistakes as to imply bad faith on the part of the arbitrator?* Doubtless it will be admitted that such an allegation is more of a conclusion of law than a statement of fact, and it might be argued by inference from many cases that it is not necessary to allege in the pleadings the conclusion suggested. Furthermore, the cases holding that the court of claims is governed substantially by the facts proved rather than technical rules are in point (*supra*, p. 45). However, a case which deals with the subject ex-

*Note. For a definition of actual and constructive fraud, see Hume v. U. S., 132 U. S. 406, opinion by Fuller, C. J.

pressly, and which seems determinative of the point even in courts of general jurisdiction, is as follows:

> *"It is true that the pleading does not state in express terms that fraud was committed by the engineers; but facts as to inefficiency, negligence, and gross mistakes are related, which in themselves are sufficient to constitute bad faith, and invalidate the estimates of the chief engineer. Little strength would have been given the pleading by adding a conclusion that the facts stated constituted bad faith.* If the estimates had been fairly made, they would have been binding; but when not fairly made and there are mistakes so gross as to amount to fraud on the plaintiff's rights, the estimates and decision of the chief engineer may be ignored, and a recovery of the contract price had in an action at law. Although the equitable elements of mistake and fraud may be involved, the case is essentially one at law for the recovery of money under the contract; and hence a jury was properly allowed.
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> * * * * *
>
> "Enough appears in the testimony to warrant the inference that the so-called final estimates were not fairly and honestly made, and the discrepancies are such as to show palpable mistakes and utter disregard to the rights of Hartshorn. *The fact that the chief engineer, who was to classify, measure and make final estimates, was an employee of the defendant, does not in itself weaken the force of his decision, but the law does require of persons so situated the utmost diligence and good faith,* and the testimony offered in behalf of the plaintiff tends rather to show inefficiency and negligence on his part instead of fair and honest performance of duty" (*Edwards v. Hartshorn, 72* Kansas 19).
>
> "The rule stated in *Edwards v. Hartshorn* (*72* Kan. 19), that the contractor will not be bound by the decision of an architect, engineer, or other person appointed as umpire by the contract, in case of fraud or mistake so great as to imply bad faith on his part, seems to be universally accepted" (authorities cited). *Case note,* 1 L. R. A. (new series) 1050.

One additional point involved in the above quoted portion of the court's opinion (p. 51) should be mentioned. As previously stated, it is believed clear that the directions of the Secretary of the Navy requiring the appellant to modify or change its ex-

isting contracts and to set aside its shipbuilding way and give preference to the government work, was the exercise of the exact authority which he requested Congress to give him, and which they did give in the Act of March 4 (1917). All these requirements were not put in the contract and it cannot be construed as covering it. The determination of *just compensation* as provided for in the Act *is involved,* therefore, and this is a judicial question, upon which the action of the executive branch of the government is not final and binding (*United States v. New River Collieries Co.,* 262 U. S. 341).

Assignment of Error ♯9.

The court was in error in its failure and refusal to award judgment in favor of plaintiff for such sums as should be found to be the fair value of its shipbuilding way during the period of its enforced idleness, and in addition thereto the further sum of the items arising under the provisions of the contract more particularly set out in Assignments of Error Nos. 5, 6 and 7 (supra, p. 12).

This Assignment is obviously dependent upon the decision in the preceding Assignments. If the court was in error as contended in preceding Assignments 1 to 8 inclusive, it would follow that the appellant was entitled to judgment upon the basis indicated in the "Conclusion" immediately to follow.

CONCLUSION.

If what has been said is approved, it will appear that the findings of the court of claims are insufficient for the determination of all the issues raised by the petition, in support of which evidence was introduced. When the findings are thus incomplete, a decision thereon is against the law and a new trial should be granted (*Gray v. Taylor,* 2 Ind. App. 155; *Porter v. Muller,* 65 Cal. 512; 37 *Cent. Digest,* Sec. 165 1/2; 29 *Cyc.* 818, 819).

Under these circumstances it is the practice of this Court to require findings to be amended or additional findings to be made in order that the law applying to the case may be given effect (*Brooks-Scanlon Corporation v. U. S.* [1924], 265 U. S. 106;

Duke v. United States [1924], 265 U. S. 568).* Accordingly, upon the record in the case the Court is respectfully asked to set aside the judgment of the court of claims and to remand the cause to that court for the purpose, among others, to elicit certain additional findings of fact, in accordance with the following directions:

1. To find (a) the fair and reasonable value of the plaintiff's shipbuilding Way #5 for the period of 112 days from June 18, 1917, to October 8th, 1917, during which time the said way was held idle and available for the use of the Government, at the direction of the Navy Department; (b) the fair and reasonable value of the said way for the period of 116 days between October 8, 1917, and May 30, 1917, which were in excess of the 118 days, reasonably required for the work under the contract of June 13, 1917, provided the necessary material had been duly delivered to the plaintiff; (c) what sum would constitute a reasonable allowance for depreciation of values of plaintiff's plant and property within the meaning of clause Sixteenth, subparagraph 1 (f) of the contract of June 13, 1917, and Section 302 of the revenue bill of September 8th, 1916, mentioned in said contract (R. 14); and (d) whether the whole or any part of the items of $4,400.84, including 10% of the base expenditure for salaries of superintendents and officers and $1,335.70, representing 10% of retroactive wages for labor, were items of cost of labor and other direct charges, and/or 10% thereof provided for by clause Sixteenth of the contract (R. 14).

2. To take further evidence, if need be, on which to base such additional findings.

3. To qualify or alter any of the existing findings, if necessary to bring them and the additional findings into accord.

4. To permit the amendment of the petition, if necessary, in order that same may be made to conform to the proof.

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*Note. Such also is the practice in the Court of Appeal in Great Britain (Black v. Admiralty Commissioners [1924], 1 K. B. L. R. 661, 665).

5. In the event the question designated "(d)" in the above paragraph 1 of this direction, is answered in the affirmative, to render judgment on all the findings when completed, in favor of the plaintiff for the sum of the amounts so found as directed in paragraph 1 hereof, otherwise to render judgment in favor of plaintiff for the sum of the items under the directions designated "(a)," "(b)" and "(c)" in said paragraph, together with interest, as by law required, on such sums as shall be found due.

Respectfully submitted,

FRANK E. SCOTT,
Attorney for Appellant.

APPENDIX A.

**Memorandum for the Adjustment of Wages, Hours and Conditions of Labor in Shipbuilding Plants, December 8, 1917.*

When disputes arise concerning wages, hours, and conditions of labor in the construction or repair of shipbuilding plants, or of ships in shipyards, under the United States Shipping Board Emergency Fleet Corporation, or under said Shipping Board, or under contract with said corporation, or with said board, or if, questions coming under the jurisdiction of the board arise with reference to such construction in a private plant in which construction is also being carried on for the Navy Department, and attempts at mediation or conciliation between employers and employees have failed, the adjustment of such disputes shall be referred to an adjustment board of three persons, hereinafter called the "Board," one to be appointed jointly by the said corporation and the Navy Department, one to represent the public and to be appointed by the President of the United States, and one to represent labor, to be appointed by Samuel Gompers, president of the American Federation of Labor. It is understood, however, that this memorandum shall in no wise serve as a precedent for procedure in Government plants under the War or Navy Departments, except as may be authorized by such departments.

The plants where such construction is being carried on shall be geographically districted by the Board. In each district, the contractors in whose plants such construction is being carried on, and the representatives of such international labor organizations as have members engaged in such production or construction in such plants, and are selected for the purpose by the labor member of the Board, shall be called upon, under conditions to be laid down by it, to agree upon a person or persons who shall act under the direction of the Board as examiner or examiners in such district. If the Board deems it advisable itself to name an examiner or examiners, or if the representatives of the contractors and of the labor organization do not agree, then the Board shall by unanimous action select a person or persons for such position. The examiner shall be subject to removal by the Board at any time by majority vote. It shall be the duty of the district officer of the United States Shipping Board Emergency

*Extract from "Codification of the Shipbuilding Labor Adjustment Board Awards, Decisions, and Authorizations, With Amendments and Special Rulings Annotated."—Government Printing Office, 1921. A copy of this document is on file with the record in this case #B-317, court of claims.

Fleet Corporation to report promptly to the Board and to the examiner of the district, if such examiner shall have been appointed, any dispute with reference to wages, hours or conditions of labor which he is unable to adjust satisfactorily to the principals concerned.

As basic standards where such construction is being carried on, the Board shall use the wage rate prevailing in the district in which such plant or plants are located, provided such wage rates have been established through agreements between employer and employees and are admitted to be equitable. Consideration shall be given by the Board to any circumstances arising after such wages, hours or conditions were established, and which may seem to call for changes in wages, hours or conditions. Where no such agreements exist, and where, as in the case of new industrial districts, a proper basis of wages and conditions is difficult to determine, the Board shall have the right to put into effect the rates which were awarded after due investigation and determination in other districts in which living conditions and cost of living are substantially the same. The Board shall keep itself fully informed as to the relation between living costs in the several districts and their comparison between progressive periods of time. *The decisions of the Board shall, under proper conditions, be retroactive, and it shall be the duty of the Board to make the decision effective.* At any time after six months have elapsed following such ratified agreement or any such final decision by the Adjustment Board on any question as to wages, hours or conditions in any plant or district, such questions may be reopened by the Adjustment Board for adjustment upon request of the majority of the craft or crafts at such plant affected by such agreement or decision, provided it can be shown that there has been a general and material increase in the cost of living. The decisions of the Board will, in so far as this memorandum may be capable of achieving such result, be final and binding on all parties; provided, however, that either the employers or employees in any district may have the right to appeal from the decisions rendered by the Adjustment Board to a Board of Review and Appeal to be made up as follows: Three members to be named jointly by the United States Shipping Board Emergency Fleet Corporation and the United States Navy Department, and three to be named by the President of the American Federation of Labor.

It is hereby stipulated and agreed that this memorandum shall supersede and stand in place of the "Memorandum for the Adjustment of Wages, Hours and Conditions of Labor in Ship-

building Plants," signed August 20, 1917, and that it shall become effective this 8th day of December, 1917.

(Signed):

FRANKLIN D. ROOSEVELT,
Acting Secretary of the Navy.
CHARLES PIEZ,
Vice President United States Shipping Board Emergency Fleet Corporation.
WILLIAM BLACKMAN,
Assistant to General Manager.
JAMES O'CONNELL,
President Metal Trades Department.
JOHN I. NOLAN,
International Moulders Union of North America.
J. A. FRANKLIN,
International President of Boilermakers, Iron Shipbuilders of America.
JOHN WILSON,
President Pattern Makers League of N. A.
MILTON SNELLINGS,
General President International Union of Steam and Operating Engineers.
G. A. VAN DORNES,
General Vice President I. B. of B. & H.
F. J. McNULTY,
by J. J. P., I. B. E. W.
JOHN J. HYNES,
President Amal. Sheet Metal Workers of A.
WILLIAM J. JOHNSTON,
I. A. of M., per P. Flaherty.

APPENDIX B.

*Decision as to Wages, Hours, and Other Conditions in Delaware River Shipyards.

First. During the month of October, 1917, when the Shipbuilding Labor Adjustment Board was absent on the Pacific coast, disputes arose in different yards in the Delaware River district. These were temporarily adjusted through the efforts of Mr. Raymond B. Stevens, vice chairman of the United States Shipping Board, *with the understanding that any wage scale subsequently determined by the Shipbuilding Labor Adjustment Board should be retroactive to the date when the men returned to work, November 2.* Although there may be some question as to whether this understanding was intended to apply to yards in which disputes had not yet arisen, *we have decided* to resolve this in favor of the employees and *to make the wage rates fixed retroactive as regards the shipbuilding crafts to which they apply to November 2* for all of the shipyards of the Delaware River district actually engaged in the building of ships for the Navy Department or the Emergency Fleet Corporation, to wit:

Chester Shipbuilding Co., Chester, Pa.
Harlan Plant, Bethlehem Shipbuilding Co., Wilmington, Del.
New Jersey Shipbuilding Company, Gloucester, N. J.
New York Shipbuilding Company, Camden, N. J.
Pennsylvania Shipbuilding Co., Gloucester, N. J.
Pusey & Jones Co., Wilmington, Del.
Sun Shipbuilding Co., Chester, Pa.
William Cramp & Sons Ship & Engine Building Co., Philadelphia, Pa.
Traylor Engineering & Manufacturing Co., Cornwells, Pa.

We do this because early in our investigation we became convinced by the unanimous testimony of both sides that a uniform minimum wage scale and uniform piece rates for all of the shipyards on the river from Bristol to the north, to Wilmington to the south, would be desirable, and because limiting the retroactive provision to employees who actually struck would amount to penalizing those who, notwithstanding their dissatisfaction with conditions, remained loyally at work, and thus be an incitement to future strikes.

For the yards in course of construction, to wit, the yards of the American International Shipbuilding Corporation, at Hog Island, Pa., and the Merchant Shipbuilding Corporation, at Bris-

*Extract from same document as Appendix A, p. 62, supra.

tol, Pa., we make the wage rates fixed for crafts engaged in construction work, which appeared before us with definite demands, to wit, carpenters, plumbers, pipe fitters, electrical workers, sheet-metal workers, painters, blacksmiths, moulders, and engineers, retroactive to the date when we held our hearing on conditions in those yards; that is, January 15, 1918.

* * * * * *

Fifth. The methods for determining the amount of back pay to which employees in the different yards shall be entitled shall be as follows:

(1) In the case of employees on the straight day-wage system the new hourly wage fixed by the Board is to be multiplied by the total number of hours which each employee worked from November 2 until the date when the new wage scale is put into effect. *From the quotient thus determined the total wage, including premiums and bonuses of every kind, which the employee received for his work, is to be deducted. The balance constitutes the back pay to which he is entitled.* In determining the total number of hours of employment, hours counted and paid for at time and one-half, or double time when the original payment was made, are to be counted as time and one-half or double time in calculating earnings at the new rate of wages, but all other hours are to be calculated as straight time.

(2) In the case of pieceworkers, a representative of the board is to determine, in co-operation with representatives of the pieceworkers of each craft and of each yard by a study of the actual cards of a dozen pieceworkers of each different craft in each yard, selected so as to cover the different kinds of piecework performed upon a vessel, the average increase in the earnings of such pieceworkers resulting from calculating their earnings at the new piece rates prescribed and comparing them with the earnings they actually received. *The average percentage of increase so determined for each piecework occupation, multiplied by the total earnings of each pieceworker of each respective occupation from November 2 until the date when the new rates become effective, shall determine the back pay which such pieceworker is entitled to receive.*

Sixth. *The back pay* due to both day workers and pieceworkers *shall be paid at the earliest date at which the elaborate calculations necessary to their determination can be completed, after the rates fixed by this decision are put into operation.*

Seventh. The minimum rates of wages to be paid to different classes of employees by all of the shipyards of the Delaware River

District shall be those set forth in the schedule appended hereto (Exhibit A), which is made a substantive part of this award.

* * * * * *

Thirteenth. No reduction in any of these piece rates is to be permitted on the part of any shipyard in the Delaware River district during the duration of the war.

Fourteenth. Believing that in this national emergency past differences between employers and employees must be forgotten in the common determination to produce the maximum possible number of ships, the board will not tolerate any discrimination either on the part of employers or employees between union and nonunion men.

Fifteenth. Rates of wages for occupations not covered by this decision shall be tentatively agreed upon between the individual shipyards and the employees concerned. Such tentative rates shall be reported to the examiner, who shall satisfy himself as to the fairness of the rates tentatively fixed and report a recommendation for their confirmation or modification by this Board. The Board shall, on the basis of such a report and recommendation, determine a uniform minimum rate for each such occupation and add it to the rates prescribed in this award.

Sixteenth. The rates and other conditions prescribed in this decision, except as otherwise provided, shall be put into effect on or before Monday, February 25, 1918.

Washington, D. C., February 14, 1918.

V. EVERIT MACY,
Chairman,
LOUIS A. COOLIDGE,
A. J. BERRES.

(12)

Office Supreme Court, U. S.
FILED
MAR 16 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 237.

SUN SHIPBUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPELLANT'S MOTION TO REMAND.

FRANK E. SCOTT,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 237.

SUN SHIPBUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPELLANT'S MOTION TO REMAND.

Upon the record and briefs filed herein the appellant respectfully moves the court to set aside the judgment of the Court of Claims and remand the cause to that court with directions to make certain additional findings of fact, as follows:

1. To find (*a*) the fair and reasonable value of the plaintiff's shipbuilding way No. 5 for the period of 112 days from June 18, 1917, to October 8, 1917, during which time the said way was held idle and available for the use of the Government, at the direction of the Navy Department; (*b*), the fair and reasonable value

of the said way for the period of 116 days, between October 8, 1917, and May 30, 1917, which were in excess of the 118 days reasonably required for the work under the contract of June 13, 1917, provided the necessary material has been duly delivered to the plaintiff; (*c*), what sum would constitute a reasonable allowance for depreciation of values of plaintiff's plant and property within the meaning of clause sixteen, sub-paragraph 1 (*f*) of the contract of June 13, 1917, and Section 302 of the revenue bill of September 8, 1916, mentioned in said contract (R. 14), and (*d*), whether the whole or any part of the items of $4,400.84, including 10 per cent of the base expenditure for salaries of superintendents and officers and $1,335.70, representing 10 per cent of retroactive wages for labor, were items of cost of labor and other direct charges, and/or 10 per cent thereof provided for by clause sixteen of the contract (R. 14).

2. To take further evidence, if need be, on which to base such additional findings.

3. To qualify or alter any of the existing findings, if necessary to bring them and the additional findings into accord.

4. To permit the amendment of the petition, if necessary in order that same may be made to conform to the proof.

5. In the event the question designated "(*d*)" in the above paragraph 1 of this direction is answered in the affirmative, to render judgment on all the findings when

completed, in favor of the plaintiff for the sum of the amounts so found as directed in paragraph 1 hereof, otherwise to render judgment in favor of plaintiff for the sum of the items under the directions designated "(a)," "(b)," and "(c)," in said paragraph, together with interest, as by law required, on such sums as shall be found due.

It is further moved that this motion be heard upon the argument of the appeal herein, and be deemed as submitted with the record and argument thereof.

Respectfully,

FRANK E. SCOTT,
Attorney for Appellant.

To the Honorable the Solicitor General:

PLEASE TAKE NOTICE that the above MOTION will be made upon the argument of the appeal herein.

Respectfully,

FRANK E. SCOTT,
Attorney for Appellant.